Reshaping Workers' Compensation for Ontario

Paul C. Weiler

A report submitted to
Robert G. Elgie, MPP
Minister of Labour
November, 1980

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The Honourable Robert G. Elgie
Minister of Labour
Government of Ontario
Toronto, Ontario

Dr. Elgie:

I am pleased to deliver to you the first Report from my study of workers' compensation in Ontario. In this initial Report I recommend a variety of changes within the framework of workers' compensation as a separate and distinct program. In the next phase of my Inquiry I shall examine the relationship between workers' compensation and other public programs for compensation and/or prevention of personal injuries to Ontario workers.

In this document I have focussed on the major areas of concern expressed to me about compensation in this province and have developed the case for a thorough renovation of the existing system. In the course of my Inquiry I received a host of comments and suggestions about statutory detail and administrative practice. I decided not to add to the size of an already lengthy Report by dealing with every one of these issues. I shall give you my views about such further alterations and refinements in connection with the drafting of legislative amendments to the Act.

Throughout this document I emphasize a theme which is sufficiently important to warrant stating here. Workers' compensation is an integrated system of benefits, financing, and administration. The issues which I have identified and the proposals which I have made are intertwined, one with the other. It may appear that certain individual issues might be addressed by immediate legislative action--for example, adjustment of existing benefit levels to inflation. However, I caution against this or other piecemeal changes to the Act without first coming to grips with the fundamental (and more difficult) issues of what kinds of workers' compensation benefits we wish to provide in the first place, and how we are to pay for them.

I look forward to the opportunity of speaking with you personally about the contents of this first Report.

Respectfully,

Paul Weiler

Paul C. Weiler
Mackenzie King Professor
of Canadian Studies

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Preface

On January 30th, 1980, I was appointed by the Government of Ontario to review the system of workers' compensation in this province. My mandate was a broad one:

> "to study and make recommendations with respect to the system of workmen's compensation in the Province of Ontario and its administration and, without limiting the generality of the foregoing, to study and make recommendations with respect to,
> a) the decision-making procedures of the Workmen's Compensation Board and the review of the Board's decisions by external tribunals, courts or the Ombudsman;
> b) the scheme of compensating injured workmen and the dependants of workmen, and methods of periodic revision of compensation;
> c) the appropriate method of financing compensation and funding formulae designed to promote occupational health and safety by contributing employers;
> d) the relationship between the Workmen's Compensation Board and the Occupational Health and Safety Division of the Ministry of Labour, the role of worker advisors, the decentralization of adjudication of claims and other related matters."

In this preface to my Report on the current state of workers' compensation and my proposals for change, I shall first describe the nature of the Inquiry which I have conducted.

As an outsider, I was initially struck by the size of the Workers' Compensation Board.* The Board's 3,000 employees process a total of 460,000 claims a year. The best way to grasp the dimensions of that figure is to realize that an inexorable flow of 2,000 claims inundates the Board's mailroom each and every working day of the year. The Board's annual budget is nearing the 700-million-dollar mark.

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* Actually the current name is the Workmen's Compensation Board (and the statute is the Workmen's Compensation Act). In the year 1980, it is unnecessary to make the case that this nomenclature is anachronistic, offensive, and must be changed. Thus, I have taken the liberty of anticipating this first provision in the new amending legislation by referring throughout this report to the *workers'* compensation system (and Act, and Board).

Assessments are levied on 155,000 employers in the province. The Board's investment portfolio is just under two billion dollars. At the minimum, these figures made me cautious in venturing to make proposals for sweeping changes in the system.

The next impression, following quickly upon the first, is that the Workers' Compensation Board is an embattled agency. The Board is a perennial target of newspaper editorials, or speeches in the Legislature, even of street demonstrations. Many of the briefs written for my Inquiry were derogatory in tone, especially the ones from trade unions and injured worker groups. A highly publicized brief of the Ontario Federation of Labour contained such references as these to the Board: a "cash register mentality", a "nightmarish jungle", a "human Frankenstein". Meanwhile, Ontario employers, whose assessments have increased by 60% in real terms in the past decade, are somewhat bemused to read that the Board is described as no more than "cheap insurance for big business." While a little more polite than the union movement, the attitude of Ontario employers is captured in the comment that the Board is bending over backwards to "extend the benefit of the unreasonable doubt" to employees. Caught in this cross-fire of criticism, the Board itself is looking for major reforms in the program.

Not surprisingly, my own study was soon caught up in this highly charged atmosphere. In my initial discussions with the Minister of Labour, it was agreed that I should not be appointed as a Royal Commission to conduct a full-fledged formal inquiry. Instead, I was to proceed informally, to consider a number of issues and proposals now on the agenda for reform of workers' compensation in Canada, to talk to interested groups and parties in Ontario in order to learn what kinds of changes in the system would be broadly acceptable to them, and to report back to the government by the fall of the year with a package of proposals for statutory reform.

It was quickly evident that the problems confronting me should be divided into two categories, to be dealt with in two distinct phases of my Inquiry. The first encompassed the variety of issues within the current framework of workers' compensation: its structure of benefits, system of financing, and decision-making procedure. The second phase included a number of broader concerns: the relationship between the system for compensating injured workers and programs for improving the safety of the workplace; the emerging notion that workers' compensation might be folded into a broader system for protecting everyone against income loss due to personal injuries, however caused; and, finally, the growing concern about industrial disease. These are newer issues on the reform agenda, requiring a longer, more leisurely inquiry. The judgment of the Minister of Labour was that the immediately pressing problems within the system, which have been debated in Ontario and elsewhere for the past decade, should be tackled immediately; and that action on these should not wait on the results of further studies.

The timetable on which I was to operate placed severe logistical restraints on the conduct of my Inquiry. I could not follow the typical course of a Royal Commission: finding and renting separate quarters, recruiting a staff, hiring a commission counsel, mounting a variety of research projects, scheduling and advertising hearing dates, traveling around the entire province to hear testimony from everyone with something to say about workers' compensation, and then writing my Report. Instead, I had to move quickly, informally, and privately to perform the task set for me by the government. It is fair to say that the business community greatly preferred this more pragmatic approach to the subject. Most union leaders to whom I spoke found it acceptable as well. However, the leagues of injured workers, many student legal aid committees, and a number of trade unions found this procedure unpalatable. They formed a Committee on the Weiler Inquiry which vigorously criticized my approach. One of the chief spokesmen for this group wrote that he "failed to see how workers' compensation in the province can be rectified by a study which is as autocratic, autonomous, secretive and paternalistic as the Board itself." When the Minister was unwilling to have my *modus operandi* changed, these people picketed me regularly at the Ministry of Labour in downtown Toronto.

In view of the controversy in which my Inquiry has been embroiled, I believe that the reader of this Report is entitled to know how I did proceed, as a basis for evaluating my many recommendations. At the outset, I spent time reading and digesting the scholarly literature in workers' compensation and the abundant variety of government studies and reports which have been issued in Canada and other countries. I also consulted with leading experts in compensation in both Canada and the United States for help in defining the important issues within the current program and formulating the range of alternative solutions. On this footing, in the spring I met with leaders of several key organizations and groups — unions, employers, and injured workers — for a preliminary sounding of their views on the scope and direction of my Inquiry. I also wanted to encourage them to prepare systematic briefs developing their position on the central issues which had be be dealt with. At the same time I was consulting with officials in the Ministry of Labour, the Office of the Ombudsman, members of political parties, and, most importantly, with the Workers' Compensation Board itself, to tap their views about how the system should and might be changed.

Throughout July and August and into September, I had extensive discussions with these same people and many more. I received more than 50 written briefs, some quite lengthy, and many more letters with suggestions and ideas. I had over 75 meetings with different groups and individuals, most of them in Toronto, but some in Sudbury and Windsor. These meetings and presentations primarily involved representatives of different interest groups who deal regularly with the Workers' Compensation Board, who have studied the system and have views about how it should be changed. However, I also had the chance to speak directly to dozens of individual injured workers who had personal experience with the Workers' Compensation Board, and who gave me a number of useful suggestions. During the same months, I travelled to Saskatchewan, British Columbia, and Quebec, three jurisdictions in Canada where systematic reform of workers' compensation has recently taken place. My objective was to learn from officials in these provinces how their reform initiatives had fared in practice, and to get their reactions to new proposals which have surfaced in workers' compensation in Canada.

That is the background of this initial Report. I offer these observations about this product of my Inquiry. First, I have not personally undertaken nor commissioned new empirical research into the operation of workers' compensation in Ontario. There have been several government studies and reports on workers' compensation in the past two decades: in Ontario and other Canadian provinces, in the United States, and as part of the larger studies of personal injury compensation by Royal Commissions in New Zealand, Australia, and the United Kingdom. I distilled from these a sense of the problems, needs, and potential innovations in workers' compensation, which I then tested out with people who have experience in the program in Ontario and elsewhere. But a six-month timetable has not given me the luxury of adding to the body of scientific knowledge on this subject.

Next, the recommendations for change in this Report were put to the key actors involved with workers' compensation in Ontario, both inside and outside the system. I found that this was one of the major virtues of the informal approach. I was able to tentatively propose ideas which had occurred to me, to elicit the reactions of those who might have objections, and to probe beneath the surface of the initial public position staked out by different organizations. This is something which is next to impossible in an open hearing, under the glare of television cameras and the watchful eye of newspaper reporters taking notes. I do not suggest that each specific proposal to which I have been led by my reasoning in this Report was endorsed by all of these different groups. But I did find a remarkable consensus among union and business leaders, among injured worker groups and Workers' Compensation Board officials, about the difficulties of the current program and the appropriate thrust of the solutions.

On the other hand, this Report is not the product of the type of open hearings with broad popular participation which is standard fare for outside inquiries into areas of public policy in Canada. It might suffice for me to say only that I proceeded as directed by the Government. But I want it clearly understood that I fully agreed with the Minister of Labour in this approach, and everything I saw in the course of my study reinforced these shared convictions.

I recognize the concerns expressed by my critics. They wanted a full airing of what they believe to be the ills of the current system of workers' compensation in order to engender pressure from the general public for radical change. But there is another view of the historical record on Royal Commissions, which sees them as an instrument which cools off rather than lights up the impulse for reform. Workers' compensation is now a field of public policy which is ripe for government action. The ferment is being felt in jurisdictions across Canada. I found an appetite for searching reform among all interested groups in Ontario (including the Workers' Compensation Board itself). It would be a shame if the opportunity for immediate action were allowed to slip by just to permit people to talk to me in the leisurely course of a formal inquiry.

There is an even more important factor. There is a tendency among too many of the critics of the current system to personalize the ills in workers' compensation in the province, to impute them all to what they paint as "evil people" at the Board. Public hearings would only have fueled these emotions. Inevitably my study would have become a public inquisition on how the Workers' Compensation Board had handled specific cases in the past, rather than a vehicle for fashioning innovative solutions for the future.

This would have been an unfortunate turn of events. The Workers' Compensation Board is a massive institution. It is composed of human beings who occasionally do make mistakes in individual cases. The Board is also prone to the typical bureaucratic failing of perpetuating patterns of behaviour which may pay insufficient heed to the interests of the people whom they serve. But the Board, with all its warts, is the organization that we have. It is quixotic to suppose that if we could wish it away, then all our problems would be solved. A fundamental theme of this Report is that the primary source of the many difficulties in workers' compensation is the antiquated structure of the program, rather than the people responsible for implementing it. I found remarkable concern about these problems among the senior officials at the Workers' Compensation Board, as well as healthy receptivity to fairly radical changes in a law which they had spent a lifetime administering. I doubt very much whether these attitudes and the help I received would have surfaced had the Board been locked into an adversarial stance against its critics in public hearings before me.

Now this phase of my work has been completed. The Report which I have prepared pulls together a package of issues, arguments, and proposals for change. It is my hope that this document will serve as the springboard for a more informed, more reasoned dialogue about workers' compensation in this province. And I remain convinced that the proper forum for that debate is not in a hearing room with a Canadian academic, but rather in the building at Queen's Park which houses our elected provincial legislators.

In writing this Report I received help and assistance from a great many people interested in the future of workers' compensation, both inside and outside Ontario. There are two people whom I would single out for special acknowledgement: Jim St. John and Christine Deacon from the Research Branch of the Ontario Ministry of Labour, who have provided invaluable assistance to me throughout the course of this Inquiry.

I

A Philosophy of Workers' Compensation

A — Introduction

Workers' compensation is a vast and fractious field. In the course of my Inquiry a host of issues was raised before me. A variety of proposals was advanced. Numerous factors are relevant in appraising each of them. I found it necessary to formulate a set of principles of workers' compensation by which to steer my way through this tangle of details. As a prelude to this report, I shall spell out my views on the fundamental premises of the system. With these in mind, the reader will be able to understand the values which underpin my recommendations, and to critically assess my priorities as and when these objectives have conflicted and had to be compromised.

B — Compensation

On its face, the immediate role of workers' compensation is to reimburse employees for the losses which they suffer due to occupational injuries. Two distinct sets of judgments are implied. It must be decided first whether and how much a worker is to be compensated, and second, who is to pay for these benefits. In this Section I shall come to grips with the issues in the disbursement of compensation funds to injured workers. Under the next heading, I shall deal with the method by which these funds are raised.

In deciding what is to be the extent of compensation, one must begin with a clear vision of the nature of the program. There is a tendancy for the governments who administer it and for the employers who pay for it to identify workers' compensation with other public programs for income maintenance: with unemployment insurance or social assistance, for example. From that perspective, it is natural to be concerned about the fact that workers' compensation now pays comparatively more generous benefits and to resist proposals for further enrichment of these benefit levels.

That attitude rests on an invalid premise. In truth, workers' compensation occupies an intermediate position between our two main legal models for reimbursing lost income: tort liability and social welfare. By contrast with the tort remedy — for motor vehicle accidents, for example — workers' compensation does not aim at full redress for all damages inflicted on the worker by his injury. But by contrast with the social welfare system (old age pensions, unemployment insurance, *et al.)*, workers' compensation does aim to replace the bulk of the prior income lost by the injured claimant.

There is an explanation for this stance. Workers' compensation embodies an historic trade-off. Employees in Ontario gave up the right to sue their employers in court and to collect full damages for all the losses they had received (including pain and suffering) if they could establish legal fault on the part of the employer. In return, employees were guaranteed protection against income losses due to industrial injuries, irrespective of fault.* Back in the early part of the twentieth century, it might have appeared that Ontario workers were not giving up very much. The tort liability of the employer was hedged about with steep legal hurdles (the contributory negligence bar, the *volenti* doctrine, and the fellow-servant rule). Even if the claim could, theoretically, be navigated through these shoals to establish the employer's legal responsibility, there were grave practical difficulties in the litigation: e.g., securing and paying for legal counsel, or resisting offers for a cheap settlement while the law suit took its leisurely course. Recent developments in our ordinary courts make these obstacles to employee litigation much less intimidating now. The effective basis of tort liability is gradually moving towards what some commentators call "negligence without fault", the near-functional equivalent of strict liability. Legal aid now furnishes effective counsel in civil actions. Comprehensive health care insurance pays the hospital and doctor bills. New no-fault minimum income benefits (now compulsory in Ontario automobile insurance) remove some of the pressing concern about immediate income and give the plaintiff a financial base upon which to pursue his right to full redress in court. And these ultimate rewards can be substantial indeed: in some recent Supreme Court of Canada decisions, verdicts of six, seven, and eight hundred thousand dollars, including up to one hundred thousand dollars for purely non-economic suffering, have been awarded.

I do not suggest that workers' compensation is now outmoded and should be dispensed with in favor of a revived tort action. I believe that this would be a retrograde step. The initial premise of workers' compensation remains valid. All workers should be guaranteed protection against loss of income due to occupational injuries irrespective of the incidence of fault — be it their own, their employer's, or a fellow employee's. In return, the small number of employees who happen to have been injured as a result of the fault of their employer should not be treated as, in effect, winners in a lottery which permits them to collect substantially greater general damage awards in court. Since this is the bargain which has been struck, then the workers' compensation beneficiary must be viewed in quite a different fashion than a claimant for unemployment insurance or social assistance, who must appeal to the generosity of the community conscience. An injured worker does not enjoy his form of compensation as a matter of grace. He has been required to give up a common-law right of action enjoyed by everyone else. That right would now be worth a great deal. In return he must be considered entitled to *full* enjoyment of the statutory right he was promised in exchange. There still remains in workers' compensation considerable dilution in the degree of income maintenance afforded disabled workers. My inquiry about the validity of such limitations begins with a strong principal of full redress for such income losses, a principle which should be overridden only for cogent and compelling reasons.

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* Workers' compensation also provided, as it still does, compensation for all hospital, medical and rehabilitation costs, the other major form of economic damage inflicted by industrial accidents. Since all citizens of Ontario now enjoy that right, through the Ontario Health Insurance Plan (OHIP), the continued significance of this feature of occupational disability lies in the financial, rather than the compensation, side of the program.

C — Financing

The typical argument advanced against this principle, and in favour of restricting the generosity of workers' compensation benefits, is one of cost. We are told that we simply cannot afford full compensation of disabled workers because the bill will be too high.

From one perspective that argument is spurious. In the final analysis, society can and does "afford" all the cost of all industrial accidents. The reason is that society, taken as a whole, cannot avoid them. As and when such accidents occur, the losses must be borne somewhere. If the costs of accidents are insured through workers' compensation or some other public or private program, they will be distributed broadly among members of the community. If not, they will have to be borne entirely by the injured worker and his family. If one recalls the point I just made — that the injured worker has been denied by statute the right enjoyed by his fellow citizen to sue for full redress in court — then the latter option does not look terribly attractive.

It is illegitimate in principle to argue that the Workers' Compensation Board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford. This should be as unthinkable as would be a suggestion to the Chief Justice that the number and level of tort awards be restrained by his judges because insurance premiums are getting too high. In both cases, the same answer is appropriate: the only proper means of containing the bill for accident losses is to reduce the number of accidents themselves.

There is another way of putting this objection, one which cannot be dismissed so readily, to the effect that business should not have to absorb the unduly onerous costs of full workers' compensation, because of the impact this would have on the competitiveness and profitability of Ontario industries. This refrain brings into play the second ingredient in the Canadian model of workers' compensation: it is collectively financed by *employers,* rather than by either the immediate employer of the injured worker (as under tort law, at least if we ignore liability insurance) or by the entire community (as is social assistance). The money for compensation benefits is raised by assessments upon Ontario employers, who are distributed across a variety of industrial rating groups. It is not paid by the Consolidated Revenue Fund of the Province, whose coffers are filled by personal and corporate income taxes, sales taxes, and other such levies upon the general population.

Again there is an historical rationale for this principle: because employers were insulated from tort liability to their employees, they must foot the bill for the new program of workers' compensation. A somewhat more sophisticated theory helps preserve this method of financing workers' compensation nearly 70 years later. To some extent, occupational injuries to workers are considered an inevitable feature of industry, albeit in widely varying degrees. From an economic perspective, the costs inflicted by these injuries upon workers should be treated as a cost of the production of the goods and services produced by that industry. They should be included in and recovered through the price paid by consumers of these goods and services, just as are such traditional factors of production as the cost of capital or labour, and such modern concerns as damage to the environment. This system for financing workers' compensation through assessments upon employers is the instrument through which "enterprise liability" — a program for allocating the costs of accidents to the activity which produced them — can be implemented for industrial disabilities.

From this perspective, we will consider a number of current controversies in the financing system. For example, should employer assessments or general government revenues (and taxes) pay the cost of upgrading existing pensions for workers who were injured long ago and who are now suffering under the burden of fixed pensions in an era of double-digit inflation? Can the compensation system be utilized to maximize the accident prevention measures by industry, through sophisticated systems of experience rating with resulting refunds or surcharges for individual employers? Can this instrument accommodate the needs of collective liability insurance? I shall take up these issues later on.

In this introductory section of my Report I will make some further observations about the rhetoric in the debate about workers' compensation. Popular discussions about the system — as reflected in briefs to my Inquiry, for example — tend to be unhappily polarized. Injured workers and their union representatives uniformly call for more comprehensive, more generous benefits. Employers and their spokesmen uniformly emphasize the need to contain the costs of compensation. It is apparent that the same tacit assumption underlies these sharply conflicting attitudes: that it is Ontario workers who enjoy the benefits of the program and Ontario employers who put up the money.

From my more detached perspective, this incipient class struggle over workers' compensation rests upon an illusion. True, it is the employers who are the immediate targets of WCB assessments. They must find the money to pay this bill. However the employers pass the bulk of these expenditures on to others. (Indeed that supposition underlies the logic of enterprise liability, which is the soundest rationale for the maintenance of a separate workers' compensation program.) Ultimately the incidence of workers' compensation assessments must be distributed across three groups: the shareholders, the customers, and the employees of the enterprise. In the normal course of events one might predict that the burden of a hefty assessment increase would initially fall upon company profits, thereby reducing the rate of return to investors in that firm or industry. But management will feel the pressure to restore that rate of return on capital in order to maintain its historic profit margin over costs of production. Thus it will try to shift these additional compensation costs forward through price hikes to consumers of the product of the enterprise. If the firm in question operates within a sheltered market, that strategy may endure. But assuming some degree of competition — from either external producers of the same product or domestic producers of effective substitutes — this option soon runs into market constraints. Management, canvassing other options, will naturally analyze higher workers' compensation premiums as an increase in its overall labour costs. Instead of paying higher wages directly to its active employees, the company is required to cycle these dollars through the compensation system, from which they will emerge as disability benefits for employee casualties of that industry. And while these assessments and resulting labour costs may be tiny in some lines of work, such as insurance, they are substantial in others such as mining. The existence of hefty and growing labour costs in this form imposes market restraints upon the ability of the employees and their unions to improve, perhaps even to maintain, their real take-home earnings, ultimately through the prospect of capital investment, technological change, and resulting employee layoffs as the total price of labour becomes too high in this firm or industry.

In the final analysis I believe that compensation benefits are paid for not by capital but primarily by labour: both as consumers of higher-priced goods and as wage earners in an industry faced with increasing labour costs in a competitive world. I emphasize this point in my Report to temper the ideological tone in the debate about the level and structure of compensation benefits. Richer benefits should not be advocated as a device through which workers as a class extract a larger slice of the national income pie from capitalists as a class. Rather, workers' compensation is a vehicle through which able-bodied workers share their income with their disabled fellows.

I do not want the significance of this point to be misunderstood. When the Workers' Compensation Board assesses business for the cost of industrial injuries, rather than sending the bill to be paid out of the government's treasury, this step is not neutral in its impact. Indeed, suitably designed, this system for financing workers' compensation can be a useful lever in achieving better accident prevention by employers, who usually are in the best position to institute safety measures in their workplaces. On the other hand, for those injuries which do occur in spite of the most heroic prevention efforts, assessing employers for the costs may actually be a more regressive mechanism for footing the bill than would be relying on the taxes which flow into the Consolidated Revenue Fund of the province.

In any event, my judgment that the ultimate incidence of workers' compensation costs is borne largely by the active labour force does not shake my conviction that injured workers are entitled to fully adequate compensation for lost earnings. But this puts quite a different complexion on several issues in the design of the program to achieve this goal:

i) Does the current benefit structure generate an erratic pattern in the degree of income replacement, one which actually provides more disposable income to some injured claimants than they earned when they were fully employed?
ii) Does workers' compensation thus provide an incentive to certain claimants to remain on compensation benefits long after they are sufficiently recovered to return to work?
iii) To what extent should we expend the revenues of the program in administrative costs, whether to facilitate the quick and smooth payment of benefits to those who are legitimately entitled, or to locate and terminate the benefits of those who are not?

Expressions of concern about these issues come almost entirely from employers. The typical response by injured worker groups was to treat such a position as an effort to protect corporate coffers at the expense of downtrodden, disabled workers. This point of view is mistaken. If some claimants extract more out of the system than they are justly entitled to, the excess benefits will come out of the pockets of other workers (both as consumers or employees in the economy). Worse, perhaps, the prospect of overpayment to some workers' compensation beneficiaries has often put a damper on the prospects for reform to improve the lot of those who are now inadequately treated by the system. All of this is prelude to another principle underlying my Report. In the thorough rationalization of the structure of benefits which I propose, I shall advocate not just improvements in the places where compensation is currently too niggardly, but also the elimination of undue retention or stacking of benefits where this now occurs.

D — Administration

Raising money from employers and paying benefits to injured employees are the most visible roles of workers' compensation. Unhappily these are not smooth and frictionless activities. An organization has to be created to do the day-to-day work and to make the ticklish decisions required. The Canadian model of workers' compensation has always included a centralized public agency as the vehicle for administering the program. In Ontario, the Workers' Compensation Board is charged with the task of collecting assessments from employers, investing the funds, investigating, adjudicating, and hearing appeals about claims by injured workers, providing specialized medical care for occupational injuries, pursuing vocational rehabilitation and job placement of the disabled worker, and attempting to induce greater safety consciousness and accident prevention in the workplace. This variety of tasks demands a large organization and a sizable budget. In a field as conflict-prone as this one, it is understandable that the leaders and employees of this large bureaucracy should serve as the lightning rod which attracts the deeply-felt grievances of workers — and some employers — about the character of workers' compensation in this province.

The main battle terrain is claims adjudication. The Ontario Board deals with a massive caseload of over 450,000 claims a year. This burden requires sophisticated planning and management to process this stream of claims as quickly and as inexpensively as possible. But included in these vast numbers are a great many cases — indeed thousands and thousands each year — which may drastically affect the future life of an injured worker and his family. A sensitive and reliable intelligence must be focused on all the pertinent factors of these serious human problems.

From its origins early in this century, the Canadian model of claims adjudication has been administrative rather than judicial in tone. We wanted not only to remove employment injuries from the ordinary courts, but also to avoid the traditional ways of the courts in designing our new administrative tribunal. Now that employers were to be assessed collectively by the Board, and injured workers were to be supported from a new public fund, we believed that we could dispense with the basic adversarial format of trial adjudication, in which a judge settles a dispute which the parties choose to bring before him in light of a record developed through the efforts and skill of counsel. Instead, the Workers' Compensation Board requires that all accidents in the workplace be reported to it. Its investigators search out the facts relevant to the claim. Payments are made as speedily as possible and are adjusted to changing circumstances. Board files are never closed against the later reappearance of a disability. And the judgments reached through this investigative model are, to all intents and purposes, immune from scrutiny by the courts.

I have always been an admirer of this administrative style of decision-making, with its emphasis on the no-nonsense, pragmatic exercise of discretionary authority by the experienced insider. When the process works well, it has powerful virtues. A speedy response can be made to human needs, with a minimum of the jockeying for position one sees in tort litigation. (In fully 62% of lost-time claims, the Board is able to put a cheque in the mail to the injured worker within three days of receiving a report of the accident.) The fund of assessment revenues can be concentrated on supporting injured workers rather than on high overhead, staff, lawyers' fees, and the like. (In Ontario, less than 9% of the assessment dollar is expended on administration, as contrasted with the 50% ratio which is customary in automobile accident claims and, incidentally, in the adversarial, court-based model of workers' compensation in the United States.) Furthermore, the creation of an all-purpose tribunal makes it possible to concentrate talent, experience, and imagination in compensating, repairing, and preventing occupational injuries. Certainly I began this Inquiry determined that such an administrative instrument, with these valuable possibilities, must be preserved in workers' compensation in Ontario.

Still, it is no secret that Ontario's Workers' Compensation Board has been enmeshed in conflict and protest in recent years. People are not impressed by the distance we may have traveled from the older procedure for litigating industrial injuries in the courts. Rather, they are embittered about the distance by which workers' compensation still falls short of the high hopes of its founders. The difficulties encountered are not unique — neither to this province nor to this government program. The same dissatisfaction is encountered in the welfare system, in public housing, even in the correctional service. But, I dare say, nowhere in the Ontario government are the storm clouds more threatening than in workers' compensation. The clients of the Workers' Compensation Board in this province are simply no longer prepared to accept what they perceive as the edicts of a giant, paternalistic, closed bureaucracy located in downtown Toronto.

There are a number of tangible indicia of these feelings. Unions of injured workers have sprung up and made extensive use of student legal aid clinics. They insist on the opportunity to examine and challenge the materials upon which the fate of a disabled worker is being determined. They insist upon review of any judgments adverse to a claim. If the initial appeal fails, they will appeal again and again. In the past decade the Workers' Compensation Board has been remarkably responsive to these cries. More elaborate procedures have been developed for review of initial claims decisions. The Board has opened up its files (albeit rather hesitantly) to worker representatives, and has provided worker advisers for those claimants who do not have them. But these in-house initiatives have merely whetted the appetite for reform. A turning point may have been the creation of the institution of the Ombudsman in the mid-Seventies, which provided an outside office to which dissatisfied workers could go with their complaints. Soon these testified graphically to the dimensions of this discontent. Suffice it to say that of the total work load of the Ombudsman, which covers the vast array of decisions made by the entire public service of Ontario, fully one-third of the complaints received pertain to the Workers' Compensation Board. (And occasionally these cases have produced highly-publicized struggles between the Board and the Ombudsman, with the Legislature of the province being pressed into service as the referee.)

In assessing this litany of protest, I believe that the beginning of wisdom is to understand that there are several valid objectives in fashioning any kind of decision-making procedure. We want that procedure to be economical in its use of the program's resources and time. We want it to be accurate and reliable in the judgments which it makes about the difficult cases. We want the process to operate fairly and legitimately in the eyes of interested parties. But none of these goals can be pursued single-mindedly, without regard to the others. Unhappily, in the real world these objectives too often come into conflict. We have a limited number of institutional models with which to try to reconcile them. I would never want workers' compensation to be turned over to the courts, nor to see the Workers' Compensation Board turned into a court-like tribunal. On the other hand, the system must be moved much further down the path of openness, natural justice, and public participation along which it trod, rather gingerly, in the Seventies. Only in that way can we achieve the confidence of the community in a system whose decisions must be accepted as final even if they are unfavorable. This challenge I shall take up in Chapter Three of this Report.

E — Rehabilitation

My focus up to this point has been on the immediate job of the Workers' Compensation Board in providing monetary redress for occupational injuries. What are the principles for adequacy of compensation, for sensible financing, for fair and economic administration? Still, any achievements here remain at the level of the second-best. The more attractive tack would be to reduce the level of injuries and losses. Naturally we would like to impress the workers' compensation system into that task, even though, to a considerable extent, these reductionist goals are the target of other programs and agencies. But workers' compensation has a significant role to play here, as well. Its contribution can be divided into two areas. The first is *rehabilitation:* limiting or containing the extent and duration of the losses once the injury has occurred. The second is *prevention* of the accident in the first place. Obviously the last is the ideal. It is also the most difficult for workers' compensation to influence directly. But rehabilitation is and should be a significant theme in the structure and organization of any workers' compensation board.

Rehabilitation has three dimensions. One is medical and physical, a second is vocational and economic, and a third is social and psychological. Each of these rests on the same premise. It is bad enough, though perhaps unavoidable, when a worker is seriously injured and suffers the immediate pain and the loss of time at work. It would be inexcusable not to take steps to contain the rippling impact of this initial trauma: proper medical treatment to prevent or reduce any permanent physical impairment; retraining and relocation to make as many workers as possible economically productive again; income security for the permanently disabled worker and his family to head off the frustrations, alcoholism, sexual difficulties, and family breakdowns which too often have haunted the industrial casualties of this province. We have an obligation not only to the worker and his family, but also to ourselves, to do our best to restore compensation beneficiairies to an active, productive, and independent status.

In this Report I shall concentrate on the vocational aspect of rehabilitation, the one most closely tied into those elements of the program which are currently the subject of policy debate and statutory reform across Canada. I do not mean to downgrade the importance of physical or psychological repair of injured workers. Indeed, this phase of rehabilitation has long been a concern of the program. Workers' compensation provided full health care benefits — so that injured workers had access to medical treatment and hospital care without any anxiety about the financial expense — nearly 50 years before the citizens of Ontario achieved this protection from other types of injury or disease. The Ontario Board has received favourable notices from other jurisdictions for its programs and facilities in specialized occupational medicine and treatment. To be fair, I should note that there are also complaints about the administration of these programs, about whether the current organization and attitudes are counterproductive, especially psychologically. There are some more fundamental issues about the extent to which separate administration and delivery of health care insurance under workers' compensation should continue, given the growth of universal Medicare and broader notions of rehabilitative medicine for the handicapped. These are important issues, but I shall not take them up in this first Report.

Vocational rehabilitation, however, is directly implicated in the central focus of this Report: the design and delivery of compensation for loss of income due to occupational injuries. If our task is to maintain a decent income for the duration of such an injury, we must also be concerned with minimizing the length of time or the extent to which that injury prevents a return to work. We want to contain the cost of the program to employers (and those to whom they will pass on these costs), to secure the benefit of productive work for the community, and, most important, to enhance the sense of self-worth of the injured worker, by enabling him to look after himself rather than remain dependent on others. That is why the Workers' Compensation Board provides resources for vocational rehabilitation. It finances and administers retraining programs, it engages in job search and placement efforts for its disabled clients, and it covers the expenses for such vocational adjustment. All of this is intended to facilitate the return of the disabled worker to the workplace as quickly as is safely possible, and as completely as his physcial condition will permit.

One recurring theme in the debate about workers' compensation is the claim that this rehabilitative objective may, to some extent, be incompatible with the values of full income maintenance and fair and economic administration which I have already formulated. The difficulty is one of incentives. Suppose the system provides full redress for all income lost due to injury. As and when the worker returns to his old job (or finds another one), every dollar he earns will produce an offsetting loss of a dollar for workers' compensation. From one perspective this will look like a 100 percent "tax" on his earnings from re-employment (although, from another perspective, it means that he simply gives up a public benefit which he no longer needs and to which he is no longer entitled).

This prospect has been a particular concern of economists in the design of unemployment insurance or social assistance programs. These programs typically pay for only basic needs and/or up to a limited proportion (e.g., 50 percent) of previous income under a relatively low ceiling, in order to maintain an incentive to return to work for the more generous earnings which are available from employment. True, there is a big difference between workers' compensation and unemployment insurance. A person receives workers' compensation because he has lost his job due to a painful injury, one which has probably caused a variety of non-economic harms. It is highly unlikely that a person would deliberately inflict serious injury on himself in order to live on workers' compensation. We should not design the program on the assumption that this is a widespread problem. However, once the injury has been inflicted and pain has been suffered, there remains the question of how long the impairment will last. In some disabling injuries, such as back injuries, the degree of impairment is highly subjective. There is significant variation among different people's pain threshold and commitment to the work ethic. This is a fact of life which has to be taken account of in fashioning a sensible program for workers' compensation.

One possible strategy is to furnish an economic prod to re-employment. The system will provide considerably less than full compensation while the person is off work due to an injury in order to maximize the incentive to return to work once the injury has been healed. This has become the accepted norm in workers' compensation in the United States. It has the obvious problem that the shortfall in the general level of benefits penalizes those who are actually disabled and legitimately entitled to redress for their loss of income. The alternative task is to rely upon administrative regulation: to empower Workers' Compensation Board officials to decide who is in fact capable of working but unwilling to take suitable and available jobs. The problem with that procedure is that it confers substantial discretionary authority upon an organization which is already under serious attack, and can only aggravate the tension between bureaucratic economy and legal justice which I sketched in the previous section.

This is a dilemma intrinsic to the system, and one for which there is no self-evident answer. One must ultimately choose between competing values and principles, or at least establish comparative weights and priorities in the design of the overall program. To a considerable extent, these choices will reflect the evolution of the system in any one jurisdiction and the expectations which it has generated. The fact of the matter is that the history and function of workers' compensation has been very different from that of unemployment insurance, for example. That is why I have committed myself to these principles in the appraisal and proposals which I have made in this Report. There should be minimal dilution of the principle of full compensation for currently injured workers in the pursuit of the objective of encouraging a return to work of those who have recovered. Instead, we should rely primarily on the administrative process to sort out the truly disabled from those who are tempted to malinger, recognizing the risk of error in and conflict about these judgments. It is my hope that the new system of decision-making and appeals which I propose will prove an effective antidote to much of this.

F — Prevention

The final goal of workers' compensation is the prevention of industrial injuries. Many people consider this to be the most important objective of the program. True, a Workers' Compensation Board must try to make up the income lost by an injured worker to the extent that it can. It should try to get him back to work as quickly as is feasible. But however successful the Board may be in these endeavours, it will never undo the pain and disruption of the original accident and recuperation, nor repair a body which has been maimed forever. Thus the goal towards which we must always steer is prevention of the accident and injury in the first place, rather than concentrate simply on compensation and rehabilitation after the fact.

This sentiment about the ideal aim of public policy is so obvious as to be trite. It is not quite so apparent that the primary orientation of workers' compensation should be prevention. The reason why a Workers' Compensation Board is established in the first place is to raise money from employers to maintain the income of injured workers. This may not be the most important role in the broader world of occupational health and safety, but it is a valued role nonetheless. There are inherent limits in the ability of government, of society, to stamp out industrial injuries. We will never be 100 percent successful in that effort. Some program, some agency, is going to have to support those people who have been injured and help them rehabilitate themselves. We must be sure not to sacrifice the contribution which workers' compensation can make in performing that modest task well, by conscripting the Board into an unduly ambitious program of accident prevention.

Having made these cautionary remarks, I must immediately add that workers' compensation does have a significant part to play in the broader attack on industrial injuries. Indeed, one can seriously contend that the primary justification for retaining workers' compensation as a special compensation program is the contribution it can make to the long-term goal of reducing the level of accidents. In recent years an intriguing proposal has surfaced on the reform agenda: to absorb workers' compensation (and other forms of tort liability and disability protection) into a universal scheme which will protect all citizens against the loss of income due to sickness or accident, however caused. I shall take up this notion in more detail in the final chapter of this Report. Suffice it for now to recall that the central core of workers' compensation is to have workers collect and employers pay for income losses due to industrial injuries. But an injured worker will have precisely the same need for money to live on and to support his family with if he is prevented from working by a serious injury suffered at home, as he has if the injury occurs on the job. A natural response is that the employer should be responsible only for injuries suffered in the course of its operations, in the interest of its production. But, on reflection, that argument is shaky. First, the premise of workers' compensation is that the employers must pay for the injury irrespective of any fault on his part, even if the worker's own carelessness was the cause. In any event, I have already observed that the apparent scheme for financing workers' compensation out of assessments on business really serves as an instrument to distribute the costs of injuries across the active producers and consumers in the economy. If that be so, it is still not evident why we should retain an elaborate program to compensate those who are injured at work, but leave those unlucky enough to be injured elsewhere to the vagaries of tort liability, social assistance, and the like.*

If there is a justification for isolating industrial injuries for such distinctive treatment, it is the promotion of accident prevention. Workers' compensation requires identification of those injuries which are occupational in nature, calculates their aggregate cost, and then assesses these costs against employers in that industry. It does not do so with any implication that the employer was to blame for the injury in the moral sense of the term. Indeed, a tacit assumption of the program is that it is terribly difficult to determine what is the optimally safe standard of behaviour in an industry. Instead it operates on the premise that much, perhaps most, of the accident burden is predictable, if not inevitable. It is only a rational form of social cost accounting to require business to include this accident bill in the prices it will charge for its products, to recoup from the consumer the revenues necessary to pay for the accident toll exacted in producing the goods they wish to enjoy. In and of itself, this step may reduce the total accident bill to society by shifting consumer demand towards comparatively cheaper — because more safely produced — substitute goods and services. Even better, the fact that a hazardous workplace costs the employer money means that investment in accident prevention can be profitable. Proponents of a free market economy believe that a private entrepreneur will be more imaginative and ingenious in solving the problems of his business than would a government bureaucrat. Grant that premise, and the workers' compensation model will serve as precisely the market incentive needed to channel these innovative efforts in the direction of a safer workplace.

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* I might add that if we finance workers' compensation through assessments of employers, and if the bulk of these costs is passed on by business to the consumer or worker in that industry, the incidence of this variant on the payroll tax is likely to be considerably more regressive than would be reliance on the Consolidated Revenue Fund of the province and the general tax levies used by the government to replenish it.

That is the thesis, in any event. As well as furnishing the primary rationale for workers' compensation, this notion of general market deterrence has furnished the intellectual underpinning for recent moves towards strict liability for injuries caused by defective products. This objective is not necessarily incompatible with a general social program for sickness and accident insurance. Such a program can and does have built into it levies on employers specifically for industrial injuries. As well, there are observers who are skeptical that the kinds of dollar amounts which are involved in workers' compensation assessments can actually be a significant influence in investment decisions, in tilting the entrepreneurial trade-off between productivity and safety. Still, we do have a program of workers' compensation in this province. It is financed out of assessments upon employers. Thus it behooves us to inquire whether we are making sufficient use of this instrument in the broader struggle for a safe and healthy workplace. In a later chapter of this Report I shall deal with a specific proposal which has been made for a more sophisticated program of experience-rating individual employers in the province, with hefty refunds or surcharges on the assessment bill of those employers who are above or below average in their performance.

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The Structure of Benefits in Workers' Compensation

A — Introduction

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The most important feature of workers' compensation is the structure of benefits payable under the program. This is also the area most in need of reform in Ontario right now. Extensive renovation is required, in particular, on the scheme for replacing income losses caused by work-related injuries. The other major form of compensation benefit — payment for all hospitalization and doctor's services — is now available to all citizens of the province through the Ontario Health Insurance Plan. Whether OHIP might take over from the WCB the responsibility for processing such medical aid claims for occupational injuries is a significant issue which I shall touch on later in this Report. This chapter will deal in depth with a variety of issues pertaining to claims lodged by injured employees who have lost working time and earnings as a result of an occupational injury.

To provide some context for my discussion of specific topics, I shall first sketch the overall dimensions of the program. Workers' Compensation claims are conventionally broken down into three categories: medical care expenses, temporary income benefits, and pensions awarded for permanent disabilities. Fortunately the number of such claims allowed in any one year varies inversely with their severity. In 1979, the Board allowed nearly 250,000 pure medical aid claims and 165,000 lost-time claims. It also awarded over 15,000 pensions, nearly all of which related to accidents initially reported to the Board in 1978. Included in this number were 250 widow's pensions and 310 children's benefits paid to survivors of fatally injured workers. Finally, only 51 cases were adjudged to be permanent total disabilities.

On the other hand, the relative cost of compensation funds expended in these categories varied in the opposite direction: from ten million dollars in medical aid, to 232 million dollars for temporary disability, and 194 million dollars in permanent pensions. Even more striking is a comparison of the average cost of individual claims of these distinct types. The worker whose injury required nothing more than medical treatment cost the Board an average of just over $40 a year in 1979. The worker whose injury was a little more serious, who lost some time from work as well as needing medical treatment, cost the Board an average of $1,400 per claim. Interestingly, the annual cost of the worker whose injury left a permanent partial disability was only slightly more than this $1400 figure, because the average disability rating by the Board was just 13%. However, the average duration of a lifetime disability pension was 27 years, and thus the total cost to the Board of these claims will be $38,000 (in 1979 dollars). The average fatal accident will produce a widow's pension of $5,000 a year paid for 31 years, plus children's benefits of $1,350 a year for eight years, for a total of $65,000 a case. The least frequent claim, the permanent total disability, is also the most costly. The 51 claims in 1979 averaged $9,700 in annual pension payments, to be paid for seventeen years, for a total of $261,000. Clearly the permanent total disability pension and the survivorship benefit represent the greatest policy concern, not simply because of the need to do justice to the unfortunate victims of these industrial accidents, but also because of the fiscal implications of these claims for the compensation program as a whole.

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The basic reason why this segment of the compensation system is in such need of refurbishing is that it still rests on the outdated framework fashioned by Chief Justice Meredith in his 1913 Royal Commission Report. The ingredients of the Meredith model have been change quantitatively many times in the past six decades, but, qualitatively, hardly at all. To put it mildly, this antiquated structure now fits awkwardly into the drastically changed social and economic setting of present-day Ontario.

Directly relevant to the formula for compensation benefits are such later developments as double-digit inflation, the array of other public and private income maintenance programs, and the creation of an extensive, progressive personal income tax. Equally important to the design of a rational structure of compensation is the emergence of a service-based economy, in which slightly over half the jobs are white-collar and in which women have become a major component of the labour force. The increasing pace of scientific and medical discoveries has had contrasting effects on workers' compensation. It has made us more cognizant of the hazardous character (especially the disease potential) of many of our industrial processes, but at the same time it has radically improved our capacity for physical and vocational rehabilitation of those who are injured. These and many other trends make it high time that the structure of benefits in workers' compensation in Ontario was thoroughly reviewed and revised.

The point of lost-time benefits is to compensate the injured worker for the loss of income which he would have received had he not been injured. Thus, to provide some perspective for the following discussion, it may be useful to keep in mind the vicissitudes in the economic situation of a typical uninjured employee at work. This employee receives a gross hourly wage or yearly salary, ranging from the legal minimum wage to the occasionally stratospheric salary of the professional athlete or the corporate executive. For many workers, these earnings follow a cycle during a working career, ranging from the low starting salary paid to the inexperienced worker, to the earnings at middle age which may be sharply increased by additional overtime (or even "moonlighting" on a second job), to the later stages of a working life when one's wage rate is at its peak, but supplementary income is voluntarily foregone. Of course, the wage or salary figure is just the basic compensation from employment. Added to it are a variety of fringe benefits — in the form of paid non-working time, health and welfare insurance plans, pension contributions, *et al.* — which now typically amount to 25 or 30 percent of the overall compensation package. On the other hand, deducted from this paycheque are substantial amounts for income tax, the Canada Pension Plan, and Unemployment Insurance. This leaves a net disposable income which is considerably less than the apparent gross earnings.

A final complication: at the end of his working life the employee's basic wage rate will be much higher than it was when he began, because of regular, substantial wage increases (generated to some extent by increases in productivity, but primarily, in recent years, by general inflation). But when his working life is finished, the retired worker experiences a considerable drop in his overall income, which is now composed of the Old Age Security benefit, the contributory Canada Pension Plan, private pensions from employment, and occasionally an annuity from a registered retirement savings plan or similar form of personal savings. Most recently, the notion of automatic mandatory retirement at age 65 is beginning to be shaken.

All these variables must be taken into account in the design of workers' compensation benefits. Following are the issues I will address in this chapter*:

i) Should there be a minimum or a maximum to the level of benefits payable for lost-time claims?
ii) Should such compensation payments be a function of the gross or net disposable earnings of the worker before his injury?
iii) Should disability compensation benefits be integrated with or stacked on top of other income maintenance systems, whether these programs be public or private?

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* Intriguingly, at least to one who has participated in the debate about labour law reform, little attention was paid in my Inquiry to the issue of which workers should be entitled to this income maintenance benefit during an occupational disability. One

iv) Should workers' compensation insure the injured employee against loss of a level of retirement income, rather than full working income, as of the date of his anticipated retirement?

v) Should the level of benefits be adjusted regularly to stay even with inflation in the economy, and, if so, how should we make these adjustments to either new claims or existing pensions?

vi) In the case of occupational fatalities, should survivorship benefits be a function of the deceased worker's previous income? What adjustments if any should be made to take into account the size of the surviving family? What should be the duration of these benefits for the surviving spouse, and how much should the system encourage a return to the work force by wives who are not presently employed?

vii) On what basis should compensation be awarded to those workers who have suffered serious and permanent physical impairments — the loss of an arm, for example — but whose lost income (after a temporary period of recuperation) is minimal, because of either the nature of their occupation or their personal circumstances and resources?

There is a theme which runs through my analysis and proposals concerning each of these questions. Historically, workers' compensation has been designed to mete out *average* justice: to pay benefits according to simple, easily-administered formulas. These might reflect the losses suffered by the population of injured workers as a whole, but do so at the price of ignoring the special situation and needs of individual claimants. Although this approach may have been acceptable

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reason, perhaps, is that over the years workers' compensation legislation has gradually deleted almost all the statutory exclusions from compensation coverage. Farm workers, for example, a perennial bone of contention in other areas of employment law, were brought under the Workers' Compensation Act as far back as 1966. The one exception remains the domestic worker. Section 127 should be repealed. The Board would then be empowered to establish an industrial rating group at least for the full-time housekeeper, for whom the employer is already required to deduct taxes, *et al.* The day-worker (the person who cleans a number of houses on a regular cycle) poses substantial administrative difficulties for workers' compensation. However, inclusion under the statute would at least entitle these workers to the benefit of the statutory repeal of the common-law defenses against possible tort actions. At the minimum, this would provide the "cleaning lady" who may be injured in a home with a fair chance to collect under the homeowner's insurance policy.

While this step would complete the legal umbrella over the world of employment in Ontario, it would not accomplish effective coverage of all Ontario workers within the umbrella of the program. A number of significant service industries still have not been brought under Schedule I through a regulation establishing a rating group for them. Not just smaller establishments such as barbers, beauticians, and lawyers' and doctors' offices, but even the employees in major industries such as banking are not provided workers' compensation. To me, at least, there is little justification for such enclaves. Candidly, though, I received no complaints about this gap from employees or worker groups in these industries. Perhaps the Board might take the initiative in seeing whether there is an appetite for workers' compensation in these remaining service industries.

at the outset of workers' compensation and even for the first 50 years of its existence, it is no longer tolerable in the Ontario of the Eighties. My objective in this Report is to produce a more sophisticated and more complex set of benefits criteria: a scheme designed to expend the current pool of compensation funds in a manner which fully and adequately replaces actual income losses for which there should be redress, while minimizing the degree of duplication and undue duration of benefits which occurs within the rather crude structure of benefits currently embedded in the Ontario legislation.

B – Temporary Total Disability

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The first item of workers' compensation requiring thorough rationalization is the temporary total disability benefit. This applies to a worker who has been injured seriously enough that he cannot work for a certain period, usually for only a few days, but sometimes for more than a year of treament and recuperation. Whatever the length of absence, the principle of the system should be the same: compensate the injured worker for the income he has lost until he is able to return to his job.*

How well does the program now live up to that promise? The Ontario Workers' Compensation Board is directed to pay the injured worker 75% of his previous gross earnings, up to a ceiling of $18,500 in covered earnings. (In other words, the maximum weekly benefit payable is $266.83.) These figures are written into the statute. Ceilings have to be lifted periodically through amending legislation. Originally in 1913 the ceiling was fixed at $2,000, which more than covered the highest annual earnings of any industrial worker at the time (then assumed to be the railroad engineer earning $1,500 a year). Obviously the ceiling has subsequently dropped far below the peak of current industrial earnings. On the other hand, the statute originally limited the actual benefit to 55% of the worker's earnings. This percentage was raised to 66 2/3% in 1920 and to 75% in 1950. Even more important, at the time workers' compensation was developed, Canadian workers did not pay income taxes. Now they do, and in accordance with a scale which is significantly progressive at the higher reaches of industrial earnings. But workers' compensation benefits, which can rise as high as $14,000 a year under the current legislation, are entirely non-taxable. This non-taxable feature of the benefit is inextricably intertwined with the issues of ceiling and the percentage. I shall present my analysis of each such feature step by step, but the final assessment and the proposals which it suggests must address them all together.

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* As I mentioned earlier, a large proportion of these cases, nearly 20%, last less than a week. This figure is significant because the original program did not compensate workers for lost time of less than seven days. This triggering point was not lowered to five days until 1952, to three days in 1963, and to the day after the injury as of 1968. Only Nova Scotia (3) and New Brunswick (4) retain such a waiting period in Canada, whereas in the United States a waiting period ranging typically from two to seven days is invariably in the statute. Ontario unions (i.e., the Ontario Federation of Labour) wanted me to complete the evolution by having the Board pay for any wages lost on the day of the injury itself. Right now employers typically pick up this bill voluntarily. Rather than overwhelm the Board by adding a large number of cases to be settled through the compensation program, I would prefer that the statute place a legal obligation on the employer to pay the wages of the employee for the day of his occupational injury.

All Canadian jurisdictions now place a ceiling on the earnings covered by workers' compensation. When it was raised to $18,500 late in 1979, Ontario's ceiling was near the midpoint for Canada. It represented roughly 130% of the average earnings in the province, reaching approximately the 80th percentile of wages earned. One problem inherent in the Ontario scheme is that because the ceiling requires legislative change, it quickly lags behind this ratio (and in fact is currently down to 115%). Those jurisdictions which have engaged in renovation of workers' compensation in recent years — British Columbia, Saskatchewan, Manitoba, and Quebec — now provide for automatic escalation of their ceilings by some formula or other. Saskatchewan and Manitoba recompute their maximums to insure that only 10% of worker compensation claimants in the province will have earnings above the current ceiling. British Columbia and Quebec use a formula designed to keep the ceiling at 150% of the industrial composite wage index, which has much the same effect, covering earnings through the 90th percentile of wages and salaries (although this is subject to some dilution in effective earnings coverage, since they use Statistics Canada wage figures, which are a year behind). There has been no explicit principle underlying Ontario's periodic changes. In practice the ceiling has been set at about 125% to 130% of average wages in the province (at least at the time the changes were made), which will cover earnings through the 80th percentile of the provincial wage scale. If Ontario were to fall in line with the provinces I have mentioned (using either 150% of average wages or the 90th percentile of the wage scale), the Ontario ceiling would now have to be moved to about $24,000. On the other hand, the current Ontario ceiling is near the top in the United States, where state programs typically cover earnings only up to the state average wage.

Yet, when one considers this as a matter of principle, it is hard to see why we should have a ceiling at all. Recall that workers' compensation is not a social assistance program, neither based on need nor designed only to keep the disabled worker comfortably above the poverty line. Rather, because Ontario workers have been denied the right to sue their employers in court where they would certainly win recovery on the basis of full projected earnings (and collect damages for pain and suffering besides), they have been offered instead a statutory system which promises income maintenance on a strict liability basis in exchange for a denial of recovery for non-economic losses. The statutory program does base recovery on the previous earnings of the worker as generated in the marketplace. Thus it will pay twice the benefit to an injured employee making $18,000 a year as it does to one who makes $9,000 a year, irrespective of their relative need. But when an employee's income reaches $18,500, workers' compensation suddenly shies away from further acceptance of these market differentials. The justification for such restraint cannot be fiscal concern, since there is something of an inverse relationship between high levels of earnings and high levels of risk. (Private insurance plans encounter no difficulty in insuring high-salaried executives against income lost due to various forms of disability.) The typical explanation offered for the existence of the ceiling is that there would be squeamishness on the part of the public over including the six-figure earnings of corporate presidents in such a program. The problem, in practice, is that these populist sentiments have placed a low enough lid on workers' compensation in Ontario to exclude much of the earnings of construction tradesmen, miners, steelworkers, and others who often make more than $30,000 in a year (taking into account their overtime and bonuses).

Theoretically, I am not convinced that there is a good case for any ceiling at all. Neither was the government of Alberta, which has introduced legislation that would dispense with this provision in its program. Popular concern about corporate executives, sports stars, entertainers, *et al.*, can be dealt with by specific exclusions of these occupations from workers' compensation coverage in favour of private disability schemes (as, indeed, is the practice right now under the Ontario legislation). Still, perhaps we should leave it to Alberta to explore this uncharted terrain in Canadian workers' compensation, and return to reap the benefit of its experience in a few years. In the meantime we must respond to the practical problem of insuring that essentially all the earnings — not 80% nor even 90% — of all the industrial workers in the province are protected by the same compensation legislation which takes away their right to sue in court to collect the remainder of any income losses which they may have incurred. Thus I recommend a drastic increase in the ceiling — raising it to 250% of the average industrial wage in the province, which works out to roughly $40,000 at the present time and would cover all the earnings of more than 99% of Ontario employees. This ratio should be maintained by writing the formula into the statute, so that the Board will periodically adjust its benefit payments in light of changing average wages.*

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Once we have selected a new ceiling to include all the earnings of all the workers whom we intend to effectively cover by the Act, the next question is, how much of those earnings are to be reimbursed by the program? Traditionally, workers' compensation in Ontario, as in other jurisdictions in Canada and the United States, has left a gap, now amounting to 25% of employment earnings. It is not immediately evident why there should be such a gap, since, again, the worker has been denied his right to go to court to collect the difference. It appears that the original rationale was that recovery in tort was subject to the vagaries of a fault-based tort law, and that workers as a group were left better off by the guaranteed recovery of a portion (at that time 55%) of their previous income then they would have been had they been obliged to recover lost wages through litigation. Shortly afterwards, this thesis was reinforced by the provision of full medical and hospital care for industrial injuries. Now, of course, all citizens of Ontario enjoy public health care insurance. Tort litigation is currently a more attractive option, given the broadened standards of negligence used by courts in motor vehicle or products liability cases. Worker representatives argue that the denial of recovery of damages from non-economic harms, for pain and suffering, is a more than sufficient exchange for strict liability for employment injuries. They contend that there should be no watering down of this basic income protection, no telling the injured worker that he must experience a drop in his living standards when he has become a casualty of the workplace.

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* I add this further qualification. The ceiling on covered earnings is now the same as the ceiling on assessable payroll. Rate changes in the former have previously been accompanied by increases in the latter. This was acceptable as long as previous adjustments in the ceiling were designed simply to keep it in line with wage inflation. My proposal for a sharp increase is designed to change the principle underlying the ceiling for benefits. Thus it should not be accompanied by an automatic hike in the limits on assessable payroll. At the minimum, if the latter were to be done, the percentage assessment would have to be recalculated in order to insure that the Workers' Compensation Board not reap a sudden surplus of revenues (which would probably be the case, since these higher earnings are unlikely to generate the same proportion of compensable injuries and benefits). In other words, one must make an adjustment in the assessment ratio to preserve the same level of revenue, just as one must do when the assessment base for property taxation has been increased. Nor can one simply do that across the board, since different industries tend to have different distributions of earnings above the ceiling and different exposure-to-risk levels. Considerable work will have to be done by the Board actuary to adjust the assessable payrolls smoothly to this legislative change. But the increase in the ceiling of covered earnings should *not* be delayed while those changes in the assessment scale are being worked out.

The usual argument proposed in favour of maintaining a gap (irrespective of size) between the earnings of those who work and those who are on compensation is that we need to preserve the incentive to return to work. Few would seriously suggest that people are likely to get themselves deliberately hurt in order to collect workers' compensation. Such an injury would inflict more than enough uncompensated pain and disruption in one's non-working life to assure us about that. But once the injury has been suffered, it is conceivable that some people might put off a return to work even when they are recovered, and choose instead to live on their compensation benefits. After all, in the aftermath of a serious accident or the continuance of a nagging back pain, there may be psychological impediments to returning to the workplace. Having workers' compensation pay only a percentage of the previous earnings may provide sufficient incentive to take that step. Still, there are undeniable issues of fairness here. In effect, in order to prod those who can go back to work but will not, we erect a benefit system which leaves a substantial gap in earnings, one which also penalizes those who unquestionably cannot work by cutting back on their standard of living as well. Thus, another strand is added to the argument, to the effect that full replacement of previous earnings would actually improve the financial position of disabled workers, because no allowance would be made for certain work-related costs:

i) The injured worker does not incur job-related expenses such as transportation, cafeteria meals, special clothing, day care, *et al.* (In response, it is contended that certain disabled workers incur extra expenses because they cannot do a variety of household chores themselves.)
ii) Disabled workers on guaranteed pensions do not face the risk of unemployment and the resulting interruption in income, whether it be on account of voluntary quitting, dismissal, layoff, strike, or non-occupational disabilities. (On the other hand, many younger, permanently disabled workers have lost opportunities for career development and promotions which would have improved their relative real income.)
iii) The person on compensation does not have to sacrifice the enjoyment of leisure time to earn income from work. (The rebuttal, of course, is that leisure time may not be of much value to a worker who has been permanently crippled by an industrial injury.)

In sum, there is no self-evident case for or against a gap between pre-injury earnings and post-injury compensation. Consideration of economic efficiency points in one direction while distributional equity points in the other. In my view, the cumulative force of these two strands of argument — calculating the real, long-term net loss of earnings and providing an incentive for a return to work — does justify some margin, but only a modest one. However, one cannot make a final judgment on this issue without first addressing the major distinction between income from active employment and income from workers' compensation: the former is taxable; the latter is not.

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At the time workers' compensation was first established in Ontario, there was no income tax in Canada; the compensation system was designed on that basis. Now there is a progressive personal income tax which becomes fairly steep as one reaches the income level (just over $40,000) to which I propose the Ontario ceiling be raised. Compensation benefits received by injured workers, however, are not considered taxable income under the Federal Income Tax Act (consistent, for instance, with the treatment of tort damages awarded by the courts for loss of income from a motor vehicle accident). Recall that the current benefits are 75% of previous gross income, up to a ceiling coverage of $18,500. A single worker who now earns near that maximum would collect more in compensation payments than he received in net disposable income from work. By itself this fact troubles a great many employers. The erratic and inequitable distribution of benefits by the current system troubles union leaders as well. The single, higher-income wage earners may profit from the current structure, but the lower-paid injured worker with a fairly large family suffers. He gets none of the benefits of non-taxability (since he has little taxable income in any event), but he still loses the full 25% margin. Furthermore, raising the overall ceiling to cover higher income levels is of little benefit to the injured worker with a large family, because the stiff progressive tax structure would simply aggravate the distortions caused by the current tax situation.

All parties I met with concurred that this situation must be changed, although there was much uncertainty as to how this might be accomplished. The simplest, most sensible solution would be to make workers' compensation benefits taxable by treating them as part of one's total income (as in fact they are). Then one could redesign the scope and structure of workers' compensation on that assumption and avoid the difficult problems inherent in trying to make the adjustment within the administration of workers' compensation. But this simple step is not politically practical. Income tax law is federal; workers' compensation is provincial. Taxing workers' compensation benefits would produce more money for Ottawa, which might like to keep it to reduce its sizable budget deficit. The province would then have to upgrade its compensation scheme to insure a decent level of reimbursement of lost income. This would cost the program more money, which would come from higher assessments of Ontario employers. The employers in turn would want a rebate on their corporate taxes from Ottawa. Even this would not be totally adequate, since such a corporate tax refund would benefit an insurance company with low compensation assessment rates as much as it would a mining company with much higher assessment rates (and thus with much higher absolute increases in compensation levies for such a new system). All in all, the simple step of making compensation benefits taxable would generate a complex juggling act between Ottawa and the provinces, between government and employers, and even between employers themselves. It is fanciful to suppose that this type of reform is on the immediate agenda. We cannot wait for this step in rationalizing the current antiquated structure of compensation benefits. Instead, Ontario must redesign its present workers' compensation system on the assumption that benefits will be non-taxable for the foreseeable future.

Conceptually, the solution might still seem rather simple. We need only determine the amount of compensation payments according to the pre-injury *net* disposable earnings of the worker, after taxes were deducted. This is the best measure of the real financial loss to the worker from his injury. The problem lies in making this notion operational. Income tax depends not simply on the worker's income, but also on the number of dependents he has, and whether the latter are also working. Moreover, the marginal tax payable on lost income would always be higher than the average tax for the year for any work injury which lasts appreciably less than a year (and the gap is aggravated if the worker has other non-occupational sources of taxable income). Theoretically, the Workers' Compensation Board could investigate all these factors and calculate the precise amount of the net loss for each week and pay the benefit accordingly. The problem is that this would reduce to a shambles the administration of a system whose tally of lost-time claims will soon reach 200,000 a year. Instead, we shall have to pursue this ideal of fair and precise compensation a little less ambitiously and make some artificial assumptions. Fortunately, Quebec has already taken this step, has confronted these problems, and has explored ways of dealing with them. After discussing the Quebec scheme with officials of the Board in Quebec City, I am confident that Ontario can adopt a net income criterion that will be fair and effective.

Every year Quebec establishes a schedule of net taxable income on the basis of the existing tax law at that time. The schedule calculates the tax in ten-dollar increments up to its compensation ceiling, figuring it for workers with from zero to ten dependents. The Board does assume that none of these dependents is earning taxable income, because of the extreme difficulty it would have in determining the truth of the matter, and because of the principle of confidentiality of income tax returns. Armed with this schedule, worked out once and for all, the Board's claims adjudicator need only calculate the gross annual income of the injured worker (from information he would be supplied with as a matter of course under the current Ontario scheme), and find out the number of dependents (available from the tax-withholding form filed by the employee with the employer, and which can be double-checked with the employee if the latter has chosen to understate his dependents in order to accrue forced savings through tax withholdings). With this information, the claims adjudicator simply finds the appropriate entry in the new schedule and determines the benefit payment accordingly.

This system is much more precise and fairer than the current one in Ontario. Admittedly it makes certain concessions to administrative simplicity, but these artificial assumptions all lean in the direction of *increasing* the net figure for purposes of computing the compensation benefit (most of all for the higher-paid worker who has a working wife and who is injured for a relatively short period). Taken together with the other factors I canvassed earlier, I believe that this fortuitous increase justifies some margin between pre-injury net earnings and post-injury compensation benefits. Quebec decided on 90% when it moved to the net income basis. Ontario employers appear willing to accept this as a reasonable margin. Thus I propose that Ontario replace the current basis of compensation benefits — which pays 75% of previous gross earnings up to a ceiling of $18,500 — with the new criterion of 90% of net earnings up to a ceiling of 250% of the average industrial wage (which would now be about $40,000 a year).

C — Permanent Total Disability

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Every year there is a large number of temporary total disability claims in Ontario. Fortunately only a tiny fraction of these become total permanent disability cases (51 in 1979). The criteria for determining permanent total compensation benefits rest on many of the same premises used to calculate temporary total benefits. But the permanent situation introduces further complications which require that we examine more closely the implications of the principles of compensation.

First, there is another major income-maintenance program for disabled Canadian workers, established under the umbrella of the Canada Pension Plan (CCP). The CCP not only pays a pension after retirement from work at 65, but it also provides disability and survivorship benefits if a person cannot work. In particular, it pays a lifetime pension to anyone who suffers a "severe and prolonged disability" which totally incapacitates him from working. Eligibility is based not on the source of disability — i.e., on whether it was occupational or not — but on whether the person has contributed to the CPP and on what scale. This benefit is payable irrespective of entitlement to workers' compensation for the same disability, and the Workers' Compensation Board in turn ignores the Canada Pension Plan disability benefits. The result is that the typical permanently disabled worker in Ontario receives two benefits, one stacked on top of the other.

Some unions argue that this should not matter. They say that we should treat the Canada Pension benefit as a purely collateral matter, one which is paid for by the contributions of workers, whereas workers' compensation is financed by employers. In any event, they argue, this relatively small federal disability benefit is necessary because of inadequacies in the current workers' compensation program of the province, with its inadequate ceilings and 25% gap in income maintenance. As to the latter point, I observe that one hurdle to rationalizing workers' compensation for everyone has been recognition of the availability of this federal payment. I assume that workers' compensation should and will be improved to provide essentially full compensation for all net disposable income lost due to occupational injuries. As well, I believe it is fallacious to assume a radical difference in the source of funds for these two programs. Eventually both come out of the pockets of the active work force, who sacrifice some of their potential income to provide for the needs of their disabled fellows. Granting those assumptions, the aim of public policy must be to integrate rather than to pyramid the two types of benefits, whatever the criteria of each plan, whichever be the government that created it. In this fashion, we will achieve full compensation for disabled workers — but not over-compensation. The Canada Pension Plan is intended to establish a minimum floor for all Canadian workers. It is appropriate, then, that provincial workers' compensation serve as the last insurer which makes up the remaining income losses. There are certain technical problems in insuring that the Canada Pension Plan benefit is actually paid before allowance is made for it by the Workers' Compensation Board in calculating its benefit; however, I am satisfied that this verification will not be difficult. Hence I propose as an additional refinement in the benefit structure of workers' compensation that the CPP disability benefit be deducted from the WCB benefit.*

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Another complication posed by the Canada Pension Plan concerns the retirement pension itself, which actually raises a number of problems:

i) The net disposable income contained in a paycheque for active employment depends not only on the income tax deductions, but also on deductions for Canada Pension Plan and Unemployment Insurance. These deductions are not taken from worker compensation pensions. Hence, employers argue, if we are to follow the principle of compensating only for the actual disposable income lost by the injured worker, we must allow for these items as well in calculating the appropriate level of benefit.

ii) But, unions counter, while deductions are no longer made for these programs when a worker is on compensation, the injured worker in turn loses the service-based credits for entitlement to Unemployment Insurance or the Canada Pension Plan, entitlement which he cannot recover even if he does return to work (and is subsequently laid off or retired). This is just the tip of a larger problem posed by private pension and welfare insurance benefits, now provided as a matter of course by employers to their work force. While the Board does calculate extra wages flowing from overtime premiums, for example, in determining the appropriate level of compensation benefits, it does not take account of these other fringe items. These are either lost to the injured worker or must be purchased by him out of the net income which is paid by the Workers' Compensation Board. Hence, I was told, if we are serious about calculating the true net loss to the worker from his injury, we must not simply deduct the tax paid in fixing his workers' compensation benefit. We must also add the value of these fringe benefits.

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* Once we have made this judgment of policy, it carries an implication for another issue: the prevalence of private disability programs by which employers (or their insurers) top off workers' compensation benefits in order to restore the full gross income of disabled workers. These could produce a severe problem of overcompensation if the measure of the gap was the full difference between 100% of gross income and the 90% of net income which I propose that the Workers' Compensation Board pay, with the troubling issues of equity and incentive that this would pose. The appropriate solution is to prohibit such supplementation of the public workers' compensation program by private disability plans, at least within the scope of coverage by the workers' compensation legislation of employees and income. In other words we should adopt precisely the same policy here as was followed for the Ontario Health Insurance Program (OHIP), which proscribed private medical insurance plans topping off the scale of doctors' fees which are covered by the public scheme. Of course, my proposal to this effect rests on the premise that workers' compensation will be revised to provide fully adequate coverage as recommended. As well, one must not allow the employer to reap a windfall profit from no longer having to pay for this benefit, one which may have been negotiated in the collective agreement as a trade-off for another concession from the union. Again the solution is simple, and was found in the original OHIP legislation. The employer should be required to calculate the cost of these additional disability benefits and use that money to improve its compensation plan in other respects. The Ministry of Labour or an arbitrator can be empowered to resolve disputes about whether and to what extent this need be done.

iii) Employers respond that while there may be such a deficiency in the immediate compensation paid disabled workers, this is far outweighed by the fact that the Workers' Compensation Board pays a lifetime pension, on top of which will be stacked the flat-rate Old Age Pension, the contributory Canada Pension Plan, and private pension benefits. Take the case of an older worker who is over fifty when he is injured, after he has already accrued vested public and private pensions in significant amounts. The pyramiding of a non-taxable workers' compensation pension (especially the more generous one which I recommend) with this variety of public and private retirement plans guarantees that such a disabled worker will enjoy a far higher retirement income than if he had worked through to his normal retirement age.

iv) The final rejoinder by worker representatives is that, even granted this potential disparity at that end of the age spectrum, we must admit that the current system often under-compensates those workers who were totally disabled while they were young. The reason is that an earnings-related pension takes into account only what young workers were earning at their starting salary, whereas had they not been injured, they likely would have moved up the salary scale with training and experience.

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Each of these points is valid. All of these issues should — and can — be addressed in a more sophisticated but still workable benefit structure. These are my judgments about how this should be done:

i) in calculating the amount of compensation to be paid to an injured worker, based on his pre-injury, net disposable income, allowance should be made for the absence of Canada Pension Plan and Unemployment Insurance deductions from the workers' compensation payment, only if and to the extent that the injured worker suffers no loss of entitlement to benefits under these two public programs. Ideally, the direction for reform in this area would be for workers' compensation to maintain, uninterrupted, the protection of the injured worker under CPP and UIC, notwithstanding a period of absence from work due to the disability. As with the income tax issue, this is not a change which Ontario can bring about unilaterally. These are federal programs which Ottawa may not want to modify simply for employees who are off work because of occupational injuries. As well, analyses which I have seen indicate that the devaluation of these federal benefits as a result of compensable injuries is much less significant than might appear on the surface. A permanently and totally disabled worker is obviously no longer in need of unemployment insurance. In addition, refinements in the formula for calculating entitlement to the Canada Pension Plan prevent most periods of temporary disability from counting against the worker as and when he reaches retirement age. In my view, the Act should be revised to empower the Board to work out further arrangements with Ottawa to fully implement this principle of continued protection of the injured worker. On that footing, appropriate adjustments can and should be made in the calculation of a pension based on net disposable income.

ii) The workers' compensation system must be designed to maintain the private benefit package previously provided by the employer, or at least to compensate the injured worker for loss of those benefits. So-called fringe benefits now typically comprise 25% to 30% of the total compensation package paid to employees for their services. Much of this is in the form of paid non-working time: statutory holidays, vacations, and leaves of absence for a variety of reasons. I do not think that the Workers' Compensation Board should have to calculate the value of this time off and pay that amount to an injured worker who, after all, is not going to be at work in any event. But such significant benefits as employer-paid OHIP premiums, supplementary health care protection, dental plans, and contributions to a private pension scheme have become too important to be left out of consideration by workers' compensation. Most employers, in fact, now maintain these benefits in place for injured workers who will be returning to their jobs within a reasonable time. I believe the simplest solution to this problem is to require that all employers keep their injured workers covered by their benefit plans for as long as they are on *temporary* total compensation benefits (rather than have the Board recycle this cost to the injured worker out of the employer's assessment). If and when the Board deems that a worker has been permanently and totally injured and thus will not be returning to work, then the Board must provide acceptable substitutes for these fringe benefits, either in money or in kind.

iii) The most important of these fringe benefits is the retirement pension. The Workers' Compensation Act should require that appropriate contributions be made by the employer and by the employee to the employer's private pension plan and to the Canada Pension Plan, if possible, and that service credits accumulate on this basis while the worker is on temporary compensation. But for permanent total disabilities, a more radical change is needed. The regular workers' compensation pensions should be specifically designed to compensate for the loss of earnings during the normal working life. But after the anticipated retirement age (which can either be set at a flat 65 or vary for different industries and workers depending on relevant and predictable factors), the function of worker's compensation should be to compensate for loss of expected *retirement* income, i.e., for the loss of accumulated pension plan benefits under either public or private plans. For that purpose the Board should be empowered to purchase on behalf of its pensioners the regular credits in the Canada Pension Plan and/or the private plan. If this is not possible, the Board should calculate the appropriate amount and pay it into a Registered Retirement Savings Plan which would provide an annuity for the disabled worker at the age of 65, to supplement the retirement income which he earned while he was actively employed.

iv) Looking at the other end of the age spectrum, I believe, at least in principle, that the Board should take greater account of the fact that a totally disabling injury to a young worker will often produce an income-related pension which is much lower than what he would have earned if he had stayed at work and moved up the salary scale. I recognize the difficulties of predicting what might have happened, and the opportunities for endless litigation. The Board should not be required to speculate about future promotions, no more than it should about future dismissals or layoffs. But where there is an established job progressions scheme or salary grid encompassing the position actually occupied by the injured worker, the Board should take this into account in calculating the benefit which is intended to replace income lost as a result of the injury.

D — Fatal Injuries and Surviving Dependents

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Fortunately, fatalities represent a very small proportion of compensable injuries in Ontario, comprising only 322 out of a total of 460,000 accidents reported to the Board in 1979. Yet these are the starkest of human tragedies to which the Workers' Compensation Board must respond. The manner in which workers' compensation deals with fatalities is a telling index of the fairness and humanity of the program; unfortunately, the Ontario scheme does not win particularly favourable notices in this regard. The point was brought vividly home to me by one claimant whom I encountered, a 55-year-old woman who had recently been widowed when her husband of 30 years was killed in an accident at work. The deceased husband had been earning well over $20,000 a year. The Act permitted the Board to award her a pension of only $410 a month, or less that $5,000 a year. Her sense of injustice about this treatment was understandable. It was aggravated by the fact that the same Workers' Compensation Act denied her the right to sue the large multi-national corporation for which her husband had worked, notwithstanding the fact that the company had been convicted of safety violations (and fined a mere $2,000) in connection with this accident.

This decision is not evidence of heartlessness on the part of the Workers' Compensation Board. The result was dictated by the statutory provisions for survivorship benefits (Section 36). Ever since the Workers' Compensation Act was first in effect, it has set flat-rate pensions for dependent spouses and children. By now, this figure has been raised to $410 a month for the spouse and $112 a month for each child. This rule must be followed irrespective of the earnings of the dead worker, the length of the marriage, or the needs and circumstances of the survivor. Only in the last few years has the inequity of such a rigid rule become evident to those responsible for compensation legislation in this country. Statutory revisions of survivorship benefits have been enacted in a number of Canadian jurisdictions. It is long past time that Ontario address this issue as well.

In fairness it should be noted that in certain cases the Ontario scheme does operate quite generously. A surviving wife with three dependent children, for example, receives about $750 a month from the Workers' Compensation Board. The family is also entitled to more than $300 a month in survivorship benefits under the Canada Pension Plan. No taxes have to be paid on that income of more that $1,000 a month (or nearly $13,000 a year, plus family allowances). A good many active workers in this province do not bring home that kind of disposable income to support their families.

Of course, this fact would be small consolation to the first widow described above, who was forced to absorb a drastic cut in the income level to which she had grown accustomed. To a large extent, one's appraisal of her grievance with the system must rest on philosophical assumptions of social justice. Let me state mine simply and directly. The labour market in Canada generates substantial differentials in earnings from work. Many argue that these individual differences are often unwarranted, and that, on the aggregate, the current distribution is far too wide. Be that as it may, these differentials exist in the real world. Families develop their expenditure patterns and way of life in reliance upon them. If the wage-earner's life is suddenly and unexpectedly terminated by an industrial injury, it is the individual family's income level which the compensation system must maintain, not an abstract arithmetic need averaged over the employment spectrum. The latter, however, is the principle which workers' compensation now follows when it maintains the income of an injured worker who is totally and permanently disabled, on the basis of which he supports himself and his family. Especially in view of my earlier proposals to lift the income ceiling to more than double its current level, which would cement even further in workers' compensation its acceptance of the realities of income differentials in the outside labour market, I believe that essentially the same principle must govern the response of workers' compensation to a family which has suffered the shattering blow of the death of its breadwinner.

Recent changes in compensation legislation in Canada have inclined towards this view. Alberta now pays the family of the deceased worker the same pension which would be paid to the worker himself if he had suffered a permanent total disability. If this example were to be followed in Ontario, it would produce a survivor's pension which is equal to 90% of the previous net disposable income (less tax) of the deceased worker, and subject to deductions of any income maintenance benefits paid to the survivors under other disability-based programs (in particular, the Canada Pension Plan). When Saskatchewan recently moved to the income-based survivorship benefit, it also provided for this type of integration with the additional source of survivorship support, to avoid stacking of benefits.

Some jurisdictions have added a further refinement to the fatal accident provision in order to attain with precision the goal of preventing any drop in the real standard of living of the surviving family. The deceased worker no longer has personal expenses — food, clothing, entertainment, *et al.* — which would have to be borne out of this net disposable income. For this reason, Quebec and British Columbia both provide the sole surviving spouse with only a portion of the earnings-related disability pension: 55% of the 90% net income pension in Quebec, and 60% of the 75% gross income pension in British Columbia. In turn, this ratio is adjusted upwards for each dependent child. There is some validity in this reasoning. In my view, it should not be given nearly as much weight as in those two provinces. First, most of the reasons for discounting the permanent disability pension (to 90% of previous net earnings, as I proposed earlier) carry much less weight in a fatal accident case. As well, the family has lost the benefit of the non-income support and services of the deceased worker, much of which has a tangible economic value. Hence, I recommend that the basic survivorship benefit for the sole surviving spouse be set at 75% of the workers' previous net disposable *earnings,* less the Canada Pension Plan survivorship benefit. For the spouse with a dependent child or children, we should simply pay the same pension which we would give an injured worker with a permanent total disability.

Thus, to return to my earlier example, the 55-year-old spouse who has been married for 30 years would receive a pension income of 80% of her husband's previous net disposable earnings. In accordance with my earlier recommendation, this pension would continue until the date at which her husband would have reached 65, when it would be replaced by the full retirement income that he would have received if he were alive, topped off by the Workers' Compensation Board to the extent necessary.

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This brings me to the most ticklish issue in this area. If the statute is amended to change only the size of the survivorship benefit without concomitant adjustments to its duration, then precisely the same pension as the one described above would have to be paid to a 25-year-old woman who had been married for only 30 days. It would trouble me, as I dare say it would most citizens of Ontario, if the Workers' Compensation Board paid a pension of perhaps $25,000 a year, adjusted annually to the rate of inflation for a period of 40 years, to a woman who is perfectly capable of working and supporting herself through most of that period. The prospect looks even less attractive when one realizes that the principle of equal rights dictates that a 25-year-old husband would be entitled to the same type of pension benefit if his wife were killed at work. As in so many other areas, the problem of over-compensation in cases of this sort stands as a major hurdle to renovating the structure of workers' compensation benefits in order to do the decent thing for the many people who are legitimately entitled to more adequate compensation from the program.

The answer to this dilemma is to rethink and redefine our notion of "dependency", the historic rationale for survivors' benefits. It is common knowledge that women have entered the labor force in dramatically higher numbers in the past 20 years. This is true not simply of single women but also of married women. In the last few years it has become apparent that more and more married women are returning to work after staying home for a period of child-bearing and child-rearing. These socio-economic changes have recently produced major revisions in Ontario's matrimonial property and maintenance laws. In the cited case of the 25-year-old recently-married woman, if there had been no fatal accident and instead the marriage had broken up because of domestic troubles (statistically not an improbable event), the wife could claim only little or no financial support from her spouse. Even in the case of longer marriages and older women, the assumption which now underlies the law of maintenance payments is that these are rehabilitative in nature, designed to facilitate re-entry into employment, and not a life-long source of support. In my view, as part of its overall rationalization of survivors' benefits, workers' compensation must accommodate this new concept of the marriage relationship and spousal dependency.

It is one thing to recognize these two illustrative cases, which clearly fall on opposite sides of the line; it is another to define more precise criteria which will suit the more ambiguous cases. The problem is that we are living in a transitional period in which notions of marriage and dependency are in a state of flux. A great many family arrangements are still based on the conception of the husband as wage-earner and the wife as homemaker. But a universal system of workers' compensation must apply across the board. I am disinclined to inflict on the Workers' Compensation Board the type of discretion now exercised by the courts in tort litigation, in which judgments about the degree of dependency are made on an *ad hoc,* case-by-case basis. On the other hand, I would label too rigid and simplistic both the basic Saskatchewan criterion provision — which pays the full income-related pension for a flat five years (or until remarriage) — and the Quebec rule — which pays the spouse under age 35 for five years, but the spouse over age 35 for life (or, again, until remarriage).

I prefer a somewhat more complex scheme, modeled to a considerable extent on the British Columbia approach, which is the most thorough attack on this problem yet to appear. These are the elements of my proposal:

i) All surviving spouses would be entitled to a capital sum from the Workers' Compensation Board in connection with a fatal injury, irrespective of whether they were husband or wife, young or old, working or non-working, planning to remarry or not. A reasonable criterion for this capital figure would be the new income ceiling proposed in the program, 250% of the average industrial wage (now about $40,000), an award which has the added virtue of moving in tandem with the rate of inflation. This payment is intended to give some recompense for the severe emotional trauma inflicted by the loss of one's spouse, and also to provide a means of adjusting to the termination of that source of family income.

A judgment must also be made about whether this money should be paid in a lump sum or pieced out in the form of a spousal pension until the capital is exhausted (with suitable adjustments in the total amount to take account of inflation for the duration of the payments). My initial inclination was to favour the latter option as the best means of insuring that the money be available for a surviving spouse to live on until he or she re-entered the active work force. On reflection, however, I believe that doling the pension out in a periodic "allowance" reflects a rather paternalistic attitude. As well, I have some doubt about whether it would be the best way to facilitate a return to employment by the non-working spouse. Payment of what looks like a pension for three years or so may simply induce reliance on this as the source of income, possibly hindering active efforts to find employment which the system assumes will be the basis for the long-term support of the survivor. When the capital sum is used up, there will be resentment directed at the Board because the periodic payments are suddenly terminated. Thus, my current view is that this survivorship benefit should be paid out forthwith, like life insurance, leaving the spouse to act accordingly.

ii) This lump-sum indemnification should be the sole entitlement to workers' compensation benefits for spouses under the age of 40 with no dependent children. However, the Board should have the discretion to grant some income maintenance benefits in cases of special hardship, be it due to illness or to inability to obtain employment nothwithstanding good-faith efforts. As well, the non-working spouse should be entitled to use the vocational rehabilitation services of the Board to facilitate a return to work, and the Board should develop a program for this type of situation (one which might serve as a model for other social programs).

iii) Should the spouse have dependent children, the income-related pension would be paid until the last child reaches the age of sixteen, at which time the current flat-rate benefits would be paid in respect of any children who remain in high school or college.

iv) Should the spouse be at least 50 years old at the time of the fatality, the income-related pension (75% of net disposable income minus the CPP survivors' benefit) should be paid until the date at which the deceased worker would have been 65, at which time full retirement income is to be provided.

v) For those spouses whose age is more than 40 and less than 50 at the time of the fatal injury, one-tenth of the income-related pension should be payable (until 65) for each year of age above 40 at the time of the fatality. The object of this is to create a graduated response to age differentials, rather than the sharp total distinction drawn by Quebec at age 35 (which dictates a lifetime pension for the spouse who is 35 years old plus a day, but permits no such benefit to the spouse who is 35 years old less a day).

vi) I would retain the provision in the current legislation which terminates the dependency pension for the spouse upon remarriage or its functional equivalent (as defined in Ontario's recent matrimonial law reform). As stated in (i) above, remarriage would not affect the spouse's entitlement to the lump-sum award.

E — Permanent Partial Disability

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If the temporary total disability case is the most prevalent of lost-time claims, and the fatal accident or permanent total disability is the most tragic, then the permanent partial disability claim is by far the most troublesome and intractable problem with which the Workers' Compensation Board must contend. These are the cases which generate the majority of conflicts and appeals. It is claimants in these cases who form unions of injured workers and protest the injustices of the system. This is the greatest challenge which the Legislature must meet in renovating the structure of workers' compensation in this province.

Permanent partial disability cases are numerous and comparatively costly. A good many involve back problems or other kinds of soft-tissue injuries whose identification and scope is often largely subjective. Thus, permanent partial disability benefits generate a high proportion of the conflict and trouble cases which clog up both the Board's own appeal structure and the docket of the Ombudsman.

The difficulty does not lie in an unfeeling Board nor in an insensitive group of Board doctors, as was alleged by several injured worker groups. The true source of this malaise is the substantive policy imbedded in the scheme of the Workers' Compensation Act.

In order to understand the current system, the problems which it presents, and the solutions that I shall propose, I will set out the analytical components of any permanent partial disability case:

i) An employee suffers a *work-related injury* (or *disease);*
ii) This injury produces an enduring *physical* or *mental impairment;*
iii) The physical impairment imposes a *functional disability* on the employee, a limit on his ability to perform a role, whether the limit be physical, mental, or emotional in nature;
iv) The disability may affect either (or both) *working* or *non-working* roles;
iv) The occupational disability generates a loss of *earnings.*

It is evident that the presence of one of these components does not automatically lead to the next. A person may be injured at work but recover without any physical impairment. A person may suffer a permanent impairment (loss of part of a finger, for example) which does not affect him functionally in any way. Even if there is a functional disability, it may be one which will not significantly affect the injured worker's ability to do his work (e.g., the loss of a hand by a manager). And even if the physical impairment does not seriously disable the worker in his job, he may not suffer any income loss if he can readily be moved (with or without retraining) to another job not affected by that impairment. Most critical of all, when one traces the impact of an initial injury along the later links in the chain, it is apparent that precisely the same physical injury can produce radically different losses in earnings as a result of a variety of contingencies: *personal* characteristics of the injured worker (his age, education, skills or experience); *economic* conditions (slack or tightness in the labour market); or the *social* environment (attitudes towards and efforts on behalf of physically handicapped workers). The degree of variation in income loss is often a function of all these factors; e.g., an employer will be much more inclined to retrain a young disabled worker in a time of labour shortage than to retrain older workers, nearing retirement, in a period of labour surplus.

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The basic criterion for permanent partial disability benefits currently ignores the diverse ways in which a specific physical trauma can impinge on the real-life situation of different workers. The Act directs the

Board to estimate the extent of earnings impairment from "the nature and degree of the injury" (S.42(1)). It goes on to invite the Board to develop a "rating schedule of percentages of impairment of earnings capacity for specified injuries or mutilations" (S.42(3)). The system contemplates a clinical judgment about the immediate condition of the worker's body in which it is natural that the Board's doctors play the dominant role. But then it uses this estimate of the degree of physical impairment to determine a percentage of occupational disability and earnings loss, a percentage which is applied to the worker's previous income to generate the relevant pension benefit.

The notorious "meat chart" is the logical result, dictating that the loss of an arm will produce a pension benefit of 70% of previous earnings, loss of a leg, 50%, and so on. It is child's play to sketch examples which show the anomalous, even absurd, results. A staff lawyer who loses his left hand (perhaps in a car accident while driving to court) would receive a lifetime pension much higher in amount than would a labourer, because of the difference in their previous earnings to which the percentage rating is applied. This is so even though the lawyer would suffer no long-term income loss at all, while the labourer, who might be theoretically capable of performing a different job, might be unable to find suitable and available work because of his personal characteristics (age, literacy, or skills) or environmental factors (geographic location or economic conditions). This clinical rating system is not unique to Ontario's legislation. Its origins have long since receded into the mists of time. Presumably it was founded on the premise that, within the relatively narrow spectrum of occupations then covered by the program, there was a rough correlation between the degree of physical impairment and the extent of earnings lost (although this has never been documented, and recent studies show the claim to be spurious).

Be that as it may, this central ingredient of workers' compensation has now totally lost any legitimacy which it might have ever had. People no longer tolerate the inequities in individual cases which are produced by a system of average "rough justice". Using the earlier example, it is obvious that the labourer and his family cannot survive on a pension of a fraction of his previous income. The same Act which offers only the facade of adequate compensation for his real-life economic losses also denies him the right of access to the courts to try to recover the difference. By the early Seventies, the degree of injustice felt by injured workers had become intolerable. The Act was amended in 1974 to provide that the Board could supplement the clinically-determined pension in cases "where the impairment of earnings capacity of the employee is significantly greater than is usual for the nature and degree of his injury".

This provision has been a palliative which, if nothing else, has revealed the dimensions of the problem. In almost 3,000 cases in 1979, the Board paid supplements under Section 42(5), each of them in a situation where there was a significant divergence between the degree of physical impairment and the extent of occupational disability. But S.42(5) suffers from ills of its own, which has left it with a rather disreputable image:

i) The supplement is discretionary, conferred as a matter of administrative grace rather than statutory entitlement (by contrast with the basic benefit structure). Temporary supplements have become the battleground between Board and injured worker, on which have been exposed some of the deficiencies in the traditional administrative model in workers' compensation (which I shall address in the next chapter).
ii) The supplement is temporary, designed to tide the worker over for a relatively brief period during which the worker supposedly is rehabilitated and finds suitable alternative employment. The normal expectation is that the supplement will be paid for six months, although the Board is prepared to extend it further in exceptional situations. The problem is that subsequent re-employment is unlikely in a large proportion of the most troublesome group of cases: the worker about 50 years old, with little education, often an immigrant with poor English who has worked in unskilled jobs in heavy industry for 25 years and who now suffers from severe back pain and a degenerative disc — and who simply cannot find work in a big city with a seven-percent unemployment rate.
iii) There is an intrinsic limit on the real value of the supplement, even for those people who do find some work, because the Board interprets S.42(5) as precluding any adjustment of the previous earnings base to the inflation rate, thus gradually compressing the nominal difference between previous earnings and current income.

One could tinker with S.42(5) to cure these deficiencies. A preferable step is to rethink our entire approach to compensation for permanent partial disabilities. We must also consider the other side of the coin, which does not generate the same emotions, but which is significant nonetheless. Fully 90% of the permanent partial disabilities are rated at 20% or less. The vast majority of these benefits are awarded to people who can and do continue to work full-time without any drop in their earnings level. Yet, besides their regular income from these jobs, they are entitled to a lifetime non-taxable pension. This seems incompatible with the basic principle of workers' compensation which is to compensate for a loss of income, a loss which did not occur in these cases. Even if we recognize and accept the true fact of the matter — that workers' compensation is giving these people some redress for the impact of a permanent disability on their non-working life — it seems incongruous to base this form of benefit on a percentage of previous income. It is even worse to pay this money out in the form of a periodic pension, and in numbers and amounts which stand as the major obstacle to the adoption by workers' compensation of the principle of regular inflation adjustment for the much smaller number of pensions which are needed by injured workers to live on and to support their families.

In a sense, the nub of our problem is that we have been trying to do two things with the one instrument. We want to make up the earnings which have been lost from work and at the same time to provide some redress for the serious impact of a permanent physical disability on an injured worker's non-working life. The result is that the permanent partial disability award performs neither of these tasks very well. In principle, the solution appears simple. We should have two distinct benefits in this situation, each tailored especially for its own purpose.

What form would such a dual system take? In the first place, the Board would be directed to pay lump-sum awards to individuals who lost a limb at work or suffered some other serious form of permanent physical impairment. Here is where a revised clinical rating schedule would still be valuable — in assessing the degree to which impairment from an injury would affect long-term physical performance. This percentage would then fix a point in the scale of lump-sum awards, which would range downwards from a figure which I would set at the income ceiling in the program ($40,000 in 1980). This figure is reasonable, given both the current range of tort awards for general damages for loss of enjoyment of life, and the fact that workers' compensation awards are guaranteed on a strict liability basis.

Of course such a benefit would rest on the assumption that workers' compensation should compensate for the loss of enjoyment of one's non-working life. This does stray from the initial rationale of the system, which was that workers' compensation should provide redress only for financial losses (medical expenses and earnings from work). But whatever the theory, the fact is that for over 60 years workers' compensation has been paying thousands of injured workers for permanent physical impairment irrespective of any actual income losses. No one suggested to me — in particular, no one from the business community — that we should now adhere to the rigid logic of the original model and cease giving any redress at all to an employee who lost an eye or an arm at work but was able to continue in employment with no drop in earnings. What we should do is change the form in which we offer that financial consolation, from income-related pension for life to a lump-sum award. Following are some of the virtues of the lump-sum award:

i) It would give the money directly to the worker to do with what he wants — pay off his mortgage, buy a car, or whatever — rather than have the money doled out every month by the Board. As well, enacting this change to a lump-sum payment would eliminate the simmering controversy now enveloping the Board's discretionary power to commute permanent partial disability pensions into a lump sum.

ii) Removing the bulk of these cases from the pension rolls would clear the deck for a rational, principled approach to the problem of adjusting workers' compensation pensions to double-digit inflation — a critical need for those people who must rely on their pension income to live. Those injured workers who are back in their jobs and whose earnings are adjusted for inflation by their employers can invest their lump-sum awards as they choose.

iii) Most important of all, the lump-sum award for pure physical impairment would not be income-related. The current income-based benefit scheme can produce results which are strange and inequitable. Suppose, for example, that an administrator and a clerk were involved in a freak accident at work in which each lost a left arm as a result. The nature of their white-collar occupations permits them both to return to work at no loss of earnings. Both would receive a lifetime permanent disability award assessed at 50%, whose only justification is as compensation for the impact of this injury on their non-working lives. But the administrator would get that percentage applied to his previous earnings, perhaps $20,000 a year, while the clerk would receive only half that amount, the same disability percentage applied to previous earnings of $10,000 a year. If the compensation is for the physical impairment itself rather than for lost income, then the same amount should be paid to each. In my view, this is the main virtue of the lump-sum approach.

However, the lump-sum award lacks what some people may consider a virtue of the pension approach. In the previous example, the clerk who loses his arm at age 20 will be paid that pension for a lot longer than the administrator who loses his arm at age 50. This may be considered a fairer approach to compensation, since the impact of the physical loss is felt for a lot longer in the life of the first victim than of the second. It would be easy to modify the lump-sum approach to respond to this concern. We could simply set the basic scale for the age of 40, as a presumed mid-life point, and then vary the lump-sum awards by a factor for every five years of the claimant's age over or under this mark. I realize that varying the size of the damage awards on the basis of age may raise the hackles of some, who will claim that this is improper discrimination. I do not find this charge terribly persuasive (as it clearly would not be if the award were designed to replace income losses during one's remaining working career). The current pension benefit does respond to these age differentials implicitly; if we are to move to a lump-sum approach, we must confront the issue explicitly, whichever way we choose to deal with it.

This brings me to the second and more important aspect of the proposed change in permanent partial disability compensation. The Board should compensate such a claimant for the actual wages lost as a result of his inability to work because of his physical impairment. More precisely, the Board should pay this person 90% of the difference between his net disposable earnings before the injury (adjusted to take account of wage inflation) and his net disposable income afterwards.

The basic assumption of this proposal is quite simple. The purpose of this facet of workers' compensation is to replace income which has been lost. There is no necessary correlation between a particular form of physical impairment and its impact upon the worker's earnings. The latter depends on a variety of features in the worker's situation which will influence the manner in which the physical impairment generates an occupational disability. A just compensation system must take account of the individual's age, job, education, skills, and the geographic and economic environment in which he lives and works. We must discard the traditional notion of average justice based on some presumed relationship between the degree of physical injury and the percentage of wages lost.

This need was recognized by the British Columbia Workers' Compensation Board in the mid-Seventies, when it introduced a new approach for permanent partial disability awards in that province. The B.C. Board decided that it must move beyond clinical rating of physical impairment alone. Instead, it would take account of the variety of other factors relevant to economic impairment. On the basis of this more sophisticated approach, the B.C. Board now estimates directly the income loss which a physical impairment will produce when it impinges on an individual's peculiar situation. The Board then calculates its pension as the difference between the pre-injury earnings and the income it anticipates this worker will be able to earn with his disability.*

The British Columbia approach to permanent partial disability awards was a distinct improvement on the traditional North American model, but it evokes this criticism: however sophisticated this scheme may be, ultimately it generates a fixed-pension award. This device sacrifices one of the major advantages that workers' compensation has over tort litigation in the courts. A Workers' Compensation Board does not have to make a single, once-and-for-all judgment which will cover all contingencies. Instead, the Board has both the legal authority and the institutional capacity to make periodic payments during the lifetime of an injured claimant. An occupational disability is a variable condition. More often than not, there are marked changes in the physical condition and/or the personal situation of the disabled worker. It is unlikely that the actual wage loss in future years will remain precisely the same throughout the claimant's life as it was at the time the physical impairment stabilized and the Board set the original pension. But under the British Columbia scheme, this average yearly wage loss anticipated for the individual worker is what must be paid religiously throughout the rest of his life, come what may.

There are certain practical administrative advantages to the British Columbia approach, to which I shall return shortly. But both the union and employer groups who appeared before me expressed their preference that Ontario Board *not* turn a blind eye to probable changes in the claimant's physical or vocational condition. Instead they advocated a pure "actual wage loss" system for permanent partial disability claims; under this scheme the Board would have the flexibility to periodically review the job and earnings situation of disabled workers, and to vary the size of the benefit paid accordingly, increasing or decreasing it.

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This is currently the favoured direction for reform of the permanent partial disability claim. It is hard to contest its merits as a matter of substantive compensation policy. The logic of the bifurcated approach to permanent partial disability appealed to legislators in

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*I should mention that the B.C. Board also calculates a pension based on the percentage of clinical impairment as applied to the worker's previous income. The claimant is entitled to the higher of these two amounts. This recognizes the fact that the Board must provide some monetary redress to a person who has suffered a permanent physical injury which impairs his non-working life, even if he suffers no income loss. Under its legislation, the B.C. Board does not have available to it the preferable alternative of a lump-sum award, as I propose for this province.

Saskatchewan and Florida, both of which have enacted variants of this model. I understand that Quebec and Oregon are seriously considering this approach for their compensation systems. On balance, I am prepared to recommend that Ontario follow the same path; however, I am also cognizant of certain problems involved in actually putting this policy into effect. In the rest of this section I shall address these complexities and suggest further refinements of the model designed to deal with them.

Of the two basic objections, one is administrative and the other is economic. The administrative problem in turn has two sides to it. On the one hand, the need to establish and review the scope of actual wage loss adds another task, an onerous one, to a Board already burdened by an annual caseload which is nearing the half-million mark. From the point of view of the injured worker, he loses his automatic entitlement to a fixed pension which is independent of the bureaucratic favour of a Board already distrusted by many of these permanently disabled workers.

The process of administrative decision-making at the Board is a subject which I shall take up in detail in the next chapter. Suffice it for now to say that I agree that creation of a more sophisticated form of permanent partial disability benefits would expand the need for administrative judgment by the Board and the potential for human error and conflict. However, if such a change in the substance of the program would produce major improvements in our ability to adequately compensate those workers — and only those workers — who suffer real economic losses because of industrial injuries, the additional administrative burden and bureaucratic discretion would be a small price to pay.

Even as to the latter concerns, we must place them in perspective. First, the payment of lump-sum awards will enable the Board to close the files, to all intents and purposes, of a large number of permanent disability cases which will never need actual wage-loss compensation in the future; but which now involve adjustments for inflation, requests for commutation, *et al.* Second, the current state of this area of compensation should leave no one under any illusion about the ability of rigid rules to stifle conflict and tension within complex human situations. The Ontario program now has all the vices of *ad hoc* supplements to make up unusual income losses — with worker claims, bureaucratic investigation and discretion, and appeal after appeal — but without any of the virtues of a rational set of legal principles with which to handle such cases. What I propose, instead, is legal entitlement for the disabled worker to full compensation for his actual but varying losses. This would replace the current right to a pension in a fixed but too often inadequate amount, plus the hope of a supplement, dispensed at the favour of the Board, to provide a decent income. Whatever else may be said for or against this proposal, I am satisfied that it can produce a signal improvement in Board administration of workers' compensation in this perennial trouble spot.

The other concern, the economic one, is more substantial. What would be the effect of an "actual wage loss" benefit on the incentive of the disabled employee to return to work? The reasons for this concern are obvious. We deal here not with an injury from which there has been full recovery, but rather one which has left a permanent physical impairment. The employee has been absent from work for a lengthy period of recuperation, receiving temporary total disability benefits. Now he faces the prospect of returning to work. Even in his old job he would have to face making some adjustments for his handicap. Often he has to be put in a new job with which he is not familiar and for which he may need considerable training and orientation. Many times he has to find this job with another employer, and start again at the bottom of the seniority list. Occasionally he may even have to uproot himself and his family and move to another location to find jobs for which he is suited. These are the kinds of hurdles which confront many a permanently disabled worker before he takes that first step back to work. What is the structure of financial incentives which confronts him? If he stays home on compensation benefits, he receives 90% of his previous net disposable income (from which he need pay for no work-related expenses, nor need he fear an interruption in this income from dismissal, layoff, or non-occupational injury). If he goes back to work, he receives for his pains and loss of leisure 100% of his new current net earnings (subject to the above payments and uncertainties). Unless he actually finds a better paying job than he had before — a statistically unlikely prospect for a permanently disabled worker — he is, in effect, faced with a 90% "tax" of his earnings from work. For every dollar that he earns at his new job, he loses 90 cents in compensation benefits. If popular lore about the progressive income tax is any indication, such a steep "tax rate" will have a serious impact on his incentive to work.

In drawing this analogy to the income tax, I do not mean to suggest that there really is a tax, or that the government is unfairly depriving the disabled worker of money that should rightfully be paid to him. The purpose of workers' compenstion benefits is to replace income lost because an occupational injury prevents an employee from working. It is not designed to replace income indefinitely for people who were injured and who subsequently recovered sufficiently to be able to go back to work, but who prefer not to. Indeed, probably most compensation claimants view it this way as well. Work has its psychological as well as its financial rewards. Many people like their job and the sense of self-confidence and independence which it provides. They feel sufficiently responsible to the community to leave the compensation rolls when they no longer need the benefit. But I do not have a romantic enough view of human nature to assume that this is true of everyone. Many of the jobs to which injured workers must return, or which they must find, are not very attractive. I have mentioned the pain, the personal disruption, and the retooling of skills which may confront the disabled worker. The fact that for every dollar earned from that effort, he must give up a guaranteed 90 cents in compensation benefits definitely presents an incentive problem which has to be faced.

Yet, in dealing with this issue, we must also consider the other side of the coin. The typical way in which social programs for income maintenance handle the work incentive issue is by replacing only a portion of the lost income; e.g., unemployment insurance will replace 60% of the lost income up to a relatively tight ceiling. The gap left between the public benefit and the private earning potential is considered sufficient to give financial appeal to returning to work (and even then many economists consider that Canada's comparatively generous unemployment insurance benefit has helped increase our "natural" rate of unemployment). Much the same policy underlies workers' compensation programs in the United States. These programs rarely replace more than 50% of income lost due to injury, on the stated rationale that this is a necessary incentive for a return to work. But what is the latent impact of this policy? Undoubtedly there are many workers who were, without question, permanently injured at the job through no fault of their own, and who have no practical prospects of finding another job, whatever be the clinically-rated percentage of disability and irrespective of how strong the urge to work. Yet, precisely the same limits are placed on this size of their compensation benefits in order to encourage other claimants to go back to work as and when they can. Moreover, it is critical to recall that the same workers' compensation legislation which does this to the permanently disabled and unemployable worker also takes away his right to sue in court, a right which is enjoyed by all other citizens, and a right for which the ultimate remedy would be full compensation for all actual wages lost. Surely it is an understatement to suggest that the economic policy which underlies much of the debate about permanent partial disability and workers' compensation raises serious issues of social justice and fairness to the individual. (And in that respect, workers' compensation poses quite a different issue than do unemployment insurance, welfare, the guaranteed minimum income, *et al.*)

There is a simple and direct response to this problem. The Workers' Compensation Board should be empowered to determine whether the disabled worker is capable of doing suitable work, whether that work is available to him, and whether he had refused to take such a job. If the response to these questions is positive, the Board will *deem* that the worker had earned the income payable in this job for purposes of calculating the actual wage loss from his injury.* Such a judgment by the Board would require a tangible indication that suitable work was in fact available to this worker, presumably through evidence that the employer, the Board, or some other agency had made a specific job offer to him. As well, if a worker refused to take the job, which might be a minimum-wage, low-paying and low-status job as a night watchman, this would not cause complete loss of his compensation benefit, which may have been based on skilled construction tradesman wages. It would mean only that the claimant would have docked from his total workers' compensation benefit the amount of earnings by which he might have mitigated his actual wage loss.

Adding this authority to the arsenal of an already embattled Workers' Compensation Board may increase the administrative qualms felt by some people about replacing the right to a fixed (but minimal) clinically-based pension with the more ambitious attempt to measure occupational disability and to compensate for the precise economic losses caused by industrial injuries. But if we decide to take this step, then the additional notion of "deemed" income is both economically necessary and fair in principle. Despite his earlier industrial accident and current physical impairment, the compensation claimant is capable of working, and there is a job slot waiting for him. If he declines this job, then the earnings he loses should be imputed to his choice, not to the original accident. The shortfall in income should not be the responsibility of those who must foot the bill for workers' compensation.

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* The Board might also be invited to experiment with positive as well as negative reinforcement of the incentive to return to work. In particularly troublesome types of cases, it could establish a graduated scale for the amount of income which is lost in workers' compensation benefits as and when a partially disabled employee returns to work. For instance, during the first three years following the determination of permanent partial disability status, the Board would deduct from the actual wage-loss benefit only 25% of the first $2,000 earned in a year at a job, 50% of the next $2,000, and 75% from the third $2,000. The objective would be to provide a significant financial incentive to the disabled employee to get back into the labour market during the critical early period of his disability. True, this would mean that there would be some over-compensation during that period, in the sense that the worker would receive more income than he would have earned if not injured. I believe that this modest investment would often pay greater dividends in encouraging vocational rehabilitation by the worker and reducing the drain on workers' compensation funds in longer-term benefits.

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These are the measures which I propose to deal with the problem of motivating the disabled employee to return to work. There are no guarantees that these steps would be 100% successful (as there never are in the real world). However, there is still another side to this problem. In emphasizing the need to design workers' compensation so as to reinforce the urge of disabled employees to become economically productive once more, we must not ignore the role of the Board and the employer. Under a system of fixed, clinically-rated lifetime pensions, there is no financial pay-off for those who find employment for the injured worker. Under an actual wage-loss program, there is a radically changed structure of incentives facing the Board and the employer to retrain disabled workers and to redesign the workplace to accommodate their needs.

From the perspective of the Board, the incentive is clear and direct. Workers' compensation funds invested in innovative programs of vocational rehabilitation would not simply produce intangible gains in independence and self-respect for injured workers; they would have a direct effect on the flow of benefits out of the workers' compensation treasury. In the last two or three years, the Ontario Board has gradually begun weaning its rehabilitation division away from the policy of requiring and monitoring routine job search efforts by claimants. Much more substantial efforts are needed. The role of vocational rehabilitation needs to be upgraded at the Board, placed on a par with claims adjudication and medical diagnosis.

In particular, the Board has to develop a more sophisticated program targeted at those injured workers who are prone to become long-term charges on the system unless extra efforts are made to retrain and relocate them in a new job. I have already sketched the profile of this case: the fifty-year-old male, comparatively uneducated and unskilled, often an immigrant with limited English, who has worked for decades in a labouring job in heavy industry, but who now suffers from low back pain and a deteriorating disc condition. This person will not be able to return to his old job. Only with difficulty can he be recycled into productive but lighter work suitable for his condition. As soon as the Board's computer registers such a case profile in the early stages of adjudicating a claim for temporary total benefits, the rehabilitation branch should be alerted. A comprehensive program for retraining and job finding must be worked out for him before the claimant becomes wedded to a life on compensation benefits. The fact that this type of person would otherwise be a major financial drain on the program for decades under an "actual wage loss" criterion should help concentrate the minds at the Board in devising creative measures for these difficult subjects in vocational rehabilitation.

Even with sustained efforts, the fact remains that the Board can only put disabled workers into jobs which the business community is willing to offer them. A number of injured worker groups, embittered by the comparative failure of their clientele to find new jobs to supplement their limited clinical pensions, urged me to consider a radically new solution: imposing a legal obligation on the employer of an injured worker to take him back into employment when he has recovered sufficiently to work, whether at his old job or in a new one. While I am not persuaded of the merits of a blanket regulation of this type, I recognize the depths of feeling behind it. One of the virtues of an actual wage-loss criterion for permanent partial disability benefits is that it may serve as a discreet economic incentive to employers to achieve the same objective in financially sound ways.

The problem of securing jobs for injured workers is a complex and many-faceted one, one which goes considerably beyond the scope of this inquiry into workers' compensation. For example, many briefs from injured worker groups advocated hiring quotas to benefit disabled workers, a practice which has been tried out in some European countries in recent decades. There are reasons for and problems associated with quota systems which I do not propose to review here. Suffice it to say that any such form of affirmative action in employment should not operate to the benefit of compensation claimants only. It would have to encompass disabled workers however they had been injured; indeed, to include people with congenital or pre-employment handicaps. My understanding is that the Ontario Ministry of Labour is reviewing the entire problem of how best to broaden employment opportunities for the handicapped; the subject of hiring quotas is best considered in that context.

My concern here is what rights, if any, the worker who has been hurt on the job and who has received compensation benefits should have against the employer in whose workplace he was injured. This problem can be broken down into a number of segments. First, I believe that the Workers' Compensation Act should contain an explicit prohibition against and an effective remedy for discrimination in employment simply because someone has been awarded workers' compensation benefits. I do not mean to suggest that it is illegitimate, *a priori,* for an employer to want to know whether an employee has been injured at work and/or is still suffering from a disability. But it is improper — and it should be illegal — to penalize an employee for having exercised his statutory right to file for compensation, or to refuse to hire an employee because he once received compensation benefits for an injury which either has left no disability, or, in any event, which cannot affect his performance on the job in question.

Second, I believe that an employee who has been injured seriously enough at work to keep him at home on temporary total disability benefits should have a right to return to his old job when he is fully recovered and able to perform it. Most collective agreements (although by no means all of them) now provide such a right of recall. Non-union employees must rely on the discretion of their employer, who might well prefer to retain a replacement. I believe that, in fairness, the interest of the injured employee, who may have invested a good part of his working life in acquiring seniority in an enterprise, but who became a casualty of the operation, should take priority over the expectations of a person newly hired to fill that vacancy. (In fact, a considerably stronger argument can be made for this principle in the present context than in the case of striking employees who now enjoy such statutory priority over their replacements.) I would modify this statutory right by establishing a minimum length of service with the employer — perhaps one year — and a comparable maximum length of time during which it must be exercised.

I do not think that the employer should be under an absolute obligation to take back an injured employee who may have recovered sufficiently to work, but whose permanent disability prevents a return to his old position. In particular, there should be no such duty to take the disabled employee back if the employer does not have available work of the kind that is suitable to the employee. Unfortunately, there is an inverse relationship between the riskiness of many industries (e.g., mining or construction) and the amount of "light work" available for handicapped employees. The true meaning of such an absolute legal obligation in these industries is that the disabled employee would have to be carried on the payroll as a supernumerary. This would be financially damaging to the industry in question — occasionally ruinous to an unlucky small business. Insisting that this kind of draconian regulation is necessary does no service to the cause of handicapped workers in the long run. As long as employers pay their assessment to a workers' compensation program which provides for actual wage-loss benefits, they may legitimately decline this extra responsibility for industrial injuries, many of which were not their fault.

What of the situation in which the injured worker has recovered, can perform suitable work, and his employer at the time of the injury has such work available? The logic of my argument implies that there should be some statutory right of recall in this case. The employee has been injured in the service of this employer. He may have invested a large part of his working life in the firm. Even if he should find another job, he would not enjoy the security and amenities which come from lengthy seniority. And to find another such job, he may have to sell his house, uproot his family from their friends and schools, and move to another locality. Unlike the previous situation I mentioned — where there is no work available — there is no reason to let this employer indulge his reticence to hire disabled workers to fill current jobs in his operations, especially since the bill for the actual wage-loss benefit would be shared by his fellow employers in the rating group. Even if we do not want to impose a legal obligation to place the disabled worker in the new job, I believe that we should empower the Board to decide whether the employer at the time of the injury has available work which is suitable for the disabled employee. If such work is not offered to the latter, the Board should "deem" that the loss of earnings which results will be added to the assessment bill of this employer, not spread over the overall rating group.

What does it mean to say that work is "available" with this employer? At the minimum, this condition would be satisfied if the employer had an appropriate job currently vacant or about to become so in the future (and for that the disabled worker could be placed on a preferential recall list). I would be prepared to go even further. Suppose that there is such a job in this plant, but it is filled by an incumbent worker whose length of service with the employer is much less than that of the injured worker (perhaps even post-dating the injury). Why shouldn't the injured worker have a right to bump the junior employee out of that job if it is the only suitable work available with the firm? Many businesses — at least those covered by collective agreements — now give senior employees such a right in the event of a layoff. Is not the need and the equitable claim even more compelling in the case of an occupational injury and permanent disability? The union leaders to whom I spoke about this problem were prepared to concede that if such a statutory seniority and bumping right were inserted in a Workers' Compensation Act, it should override special forms of departmental or job progression seniority established in their collective agreements. If the Ontario Legislature does seriously entertain this notion of bumping rights for injured workers, as I hope it will, I would suggest that at least the initial version of the right be contained within limits which would include only the clear-cut cases: perhaps only those injured employees who had worked at least ten years for an employer, and who wanted to bump into jobs filled by incumbents for less than five years. Within those parameters, such a step would provide evidence that we are prepared to pay more than lip-service to the idea of rehabilitating our industrial wounded.

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My analysis of the problem of the permanent partial disability claim has followed a long and winding path, one which has led me to a multi-faceted solution. I recommend a two-part scheme for compensation: a lump-sum award for pure physical impairment, and periodic payments for actual wage loss. This is to be buttressed by a network of economic incentives and administrative regulations designed to prod both the disabled worker and his employer to take all necessary steps towards re-employment of the former. The complexities of this analysis and proposals befit a subject as important and as tangled as this one.

The permanent partial disability claim is qualitatively different from other claims for a simple reason. Unlike the total disability claim, in which the only issue is the fairness and affordability of compensation, here we must juggle the demands of both compensation and rehabilitation. Clearly, the current response to this issue by the long-established clinical rating model is entirely discredited and must be replaced. But the more I listen, read, and reflect about this subject, the less dogmatic I become about the alternative solution. I offer my own recommendation not as the ideal, but as the least unattractive of the available options.

I am frank about this because I want the Legislature and the Board to proceed cautiously and deliberately in this area. The legal regulations and administrative apparatus must be carefully designed and in place when this part of the amending Act is proclaimed. Even more important, we must be ready to study, evaluate and learn from what we are doing at each step of the way. When a major innovation such as this is introduced into a program as important as workers' compensation, we should be prepared to mount a systematic empirical study of its impact. In my Inquiry I have been struck by how little useful research has been done on workers' compensation in North America (in contrast with collective bargaining, for example). After all, this is a public program which expends over half a billion dollars year after year in Ontario alone. A modest investment in ongoing scientific research might well shed some light on ticklish problems such as the permanent partial disability benefit, in place of the heat which envelops the popular debate right now. It would be a pity to miss the opportunity to study the real-life impact, for better or for worse, as Ontario moves from the traditional model of clinically rating physical impairment to a new regime of compensation for actual wages lost from occupational disability.

F — Workers' Compensation and Inflation

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Inflation has become a way of life in the Canadian economy, just as it has in the rest of the industrialized world. This is a relatively recent phenomenon. For a century prior to World War II, there was remarkably little long-term movement in the general price level. The occasional sharp swings upwards were compensated for by countervailing moves downwards. Since about 1940 the secular trend in prices has been uninterruptedly upward. The price level increased at what now seems a snail's pace in the Fifties (rising about one to two percent annually); it picked up speed in the Sixties (approaching three and four percent); and has been galloping near or at the double-digit level for most of the Seventies. This has profound consequences for a system of workers' compensation whose benefits and pensions were originally designed in an era of long-term price stability. They must now be redesigned for what seems, lamentably, to be perennial price inflation.

Up to now, the response has been *ad hoc* and erratic. Prior to 1974 there were periodic changes in the minimum and maximum levels of earnings covered by the program. (In the first 60 years of the system, up until 1975, there were nine such changes for a cumulative 600% increase.) However, the amounts of the existing pensions, those which had previously been awarded to disabled workers (or surviving dependents of a fatality), were not adjusted proportionately to the higher criteria for new claims. All that was done was to keep existing pensions at or above the dollar minimum for new claims. This policy was changed in the Seventies, when direct percentage adjustments were applied directly to the amounts of the existing pensions themselves. In 1974, this produced a revaluation of all existing workers' compensation pensions, which added to them two percent for each year of their existence up to 1971, another four percent for 1972, and four percent for 1973 (up to a maximum of 60 percent). These pensions were hiked a further factor of eleven percent in 1975, eight percent in 1976, and still another six percent in 1977. Most recently, in December of 1979 the government increased pensions a further two percent back to July 1978, and added another ten percent as of July 1979. Thus, in the five years from 1975 to 1979, inflation adjustments have totaled 37 percent, while the Consumer Price Index increased at total of 45 percent.

When one steps back from these historical details it is apparent that it is now government policy — in deed, if not in legal word — to revalue previously-created compensation pensions to take account of price inflation. Given the pace of inflation in the Seventies, these adjustments must be made regularly, nearly annually. But there remain major flaws in the instrument used to implement this policy. In its present form, the Workers' Compensation Act must be amended every year to write in the new numbers, and those are out of date before the ink is dry on the amending bill. Even worse, because the statute must be opened up for this purpose, the government is annually exposed to general debate on a highly-charged piece of legislation. Any government, especially one in a minority position in the house, is naturally loath to take this step without all-party agreement on both the new numbers and the need to limit the scope of debate. Securing such a consensus is risky and time-consuming, and as such lengthens the period before the inflation adjustment is made. Not only does this delay penalize the hapless pensioner in the interim, but it can raise the dollar figures to levels which evoke qualms among the business community. It is long past time for Ontario to make an explicit judgment of policy about the problem of workers' compensation and inflation, and to develop legislative criteria and a procedure which will deal with the issue in a relatively principled and non-partisan fashion.

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In addressing this issue as a matter of principle, there should be no question about the entitlement of workers' compensation claimants and pensioners to inflation adjustments as a matter of *right*. Indeed, under the new structure of benefits which I propose, the adjustment would take place automatically for almost all new claimants. Benefit criteria would no longer be expressed in arithmetic terms. Both the maximum and minimum would be functions of the average industrial earnings in the province. Survivors' benefits would be based directly on the previous earnings of the deceased worker. This means that as price inflation feeds wage movements in industry, workers' compensation benefit levels for newly-injured workers would go up in tandem.

However, this would not be true of existing pensions, those which were granted to workers some time earlier. These benefits must initially be calculated with reference to the wages then paid the injured worker. As these figures are eroded by inflation, a positive initiative is needed to revalue them. But there is nothing absolute in the nominal figure originally used by the Workers' Compensation Board to fix the pension. In the final analysis the point of this pension was to establish the disabled worker's right to share in the *real* goods and services generated by the Canadian economy. Inflation causes a general increase to occur in the money price of that same real basket of goods and services. If the government or citizenry of Ontario is not prepared to justify an explicit reduction in the real entitlement of workers' compensation pensioners, to take such a step as a conscious policy, they must not tacitly permit the same result to come about by allowing supposedly impersonal economic forces to take their course. This is why I deliberately speak of an *adjustment* to, rather than an *increase* in, pension benefits to take account of intervening inflation. We must keep clearly in mind that no real improvements to benefits are at issue here. We do no more than avoid an erosion in real income levels we earlier awarded to workers' compensation pensioners.

This is how the problem looks from the point of view of fairness to the injured worker. But we have been told again and again that Ontario business and the Ontario economy simply cannot afford the cost. This fear is unjustified. The explanation is implicit in the very notion of inflation, which consists of changes in money values, not real values.

Once we decide as a community what the appropriate level of compensation for injured workers is to be — in light of all the considerations and complexities I have already set out in this chapter — and once we award an individual disabled worker a certain share of the real economic pie, our refusal to keep the monetary amount of his pension in line with the changing rate of inflation must mean that someone else in the economy will receive a net increase in his share of real goods and services. In effect, someone will reap a windfall profit from inflation at the expense of the disabled worker.* In the case of workers' compensation benefits, the immediate beneficiary of such inaction would be business. (Recall, though, that if my earlier analysis is correct, the ultimate beneficiary is actually the able-bodied citizen and worker of Ontario, who will enjoy a higher real standard of living at the expense of his disabled fellow.) This syndrome is easily discernible in the case of current injuries, benefits, and assessments. Since inflation affects the general price level in the economy, it increases not only the price of final consumer goods, but also the price of factors of production. In particular, inflation presses upwards the wages of active employees and the employer's total payroll. Workers' compensation assessments are expressed as a percentage of this payroll figure (recently, about 1.7% for all employers in the province). But if the money amounts paid to new compensation claimants remain fixed because of the maximum ceiling on covered earnings and through fixed-dollar benefits for dependents, the application of the same assessment percentage to an inflating payroll will produce a surplus.

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* Of course, inflationary pressures can coincide with a drop in real per capita GNP. In such a situation, this point would not hold. In actual fact, periods of inflation tend to go together with increases in real growth, not reduction. This has been true of inflation in Canada throughout the Seventies. Average *real* incomes are higher now than they were at the beginning of the past inflation-prone decade.

Unless the Legislature raises these benefit levels, the Workers' Compensation Board has to reduce the assessment percentage in the next year in order to balance its books.*

The same process of redistribution of income from workers' compensation pensioners to employers — and thence to the shareholders, consumers, and active employees who share the ultimate incidence of the cost of doing business — also obtains in the case of existing pensions. A somewhat more complex analysis is needed to depict how this happens. The standard method of funding any pension is to calculate a capital amount which will be sufficient to pay for a stream of annual income over the actuarially-predicted life of the pensioner. This capital sum will be discounted from the aggregate total of payments actually made over the pensioner's life, because the fund is accumulated and invested now. The measure of the discount is the projected rate of interest to be earned by investment of the fund. But such interest rates in the economy always include a premium equivalent to the anticipated rate of inflation, because only in this way can the investor insure both repayment of his original capital and a real rate of return. Simplifying considerably, if the expected rate of inflation is eight percent and the typical real interest rate (or return on capital) is two percent, then the prevailing interest rate should be ten percent. Now, consider the implications for compensation pensions which are *not* adjusted to ongoing inflation, which is pushing interest rates up in this fashion. When the disability pension is capitalized and assessed against the employer, the nominal rate of interest in a period of substantial inflation is much higher than it would be (or was) in a period of price stability. Assume that those extra earnings in the Workers' Compensation Board pension funds are not to be used to adjust disability pensions to this inflation in order to preserve the real value of the original benefit. This can only mean that the original assessment against the employer will amount to much less in inflationary times, since it will be discounted by a much larger number (the equivalent of the higher nominal interst rates with their built-in inflation premium).

Happily, one can consider these economic truths from a less negative perspective. Just as inflation produces the need for adjustment of workers' compensation benefits to monetary inflation in order to provide distributive justice to the injured worker (again, recall, *not* to increase the real value of the benefit), so also inflation generates the financial wherewithal for the compensation system to pay for that adjustment. It does so through the impact of price inflation on the Workers' Compensation Board revenues, either from assessment of current employer payrolls or from the rate of return on its investment portfolio.

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* To some extent this effect is disguised by the fact that the ceiling for the assessable employer payroll is the same as for the insured employee earnings. If these monetary ceilings remain fixed despite inflation, it is the ratio of assessments to actual total payroll which drops sharply, while the assessment rate for assessable payroll declines only gradually. It is the former ratio which is the true index of the scope of these windfall profits generated by inflation.

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Thus, I am satisfied that the real question is not *whether* to adjust workers' compensation benefit pensions to inflation, but how to do so. There is an easy way. By simple legal mandate, index the level of compensation pensions to the changing Consumer Price Index (CPI). This would have the virtues of eliminating the political manoeuvering, delays, and hardships which surround the current adjustment process. The CPI measures the changes in price of goods and services which the injured worker has to buy with his pension. It is the standard and popularly-accepted measure of inflation in this country. It is used for other public benefits such as old-age pensions and family allowances, federal public service pensions, cost-of-living protection in collective agreements, and income tax deductions and credits. A number or jurisdictions have already moved to index workers' compensation benefits to the Consumer Price Index (British Columbia in 1966, Quebec in 1974, Nova Scotia in 1974, and the Yukon in 1975). The B.C. model is as sophisticated as any. It provides for semi-annual adjustments to changes in the CPI, made on January first for the CPI change during the previous April through October, and on July first for the CPI change during the previous October through April. There is ample ground to justify a similar move for workers' compensation pensions in Ontario.

However there are certain subtle pitfalls in simply using the Consumer Price Index in this way. Two of the most important are the following:

i) The CPI is only a rough measure of price changes in the economy. In particular, it measures a fixed basket of goods and services, one which is not necessarily representative of the situation of specific consumer groups. For example, long-term workers' compensation disability pensioners, the main concern in the design of our adjustment mechanism, would not likely be affected by the changes in housing costs and mortgage interest rates which are important components in the overall CPI. Nor does the Consumer Price Index allow for the changes in the quality of goods or the response of consumers to the wide variation in the rate of increase of different prices. I do not suggest that these are necessarily flaws in the CPI itself. Averaging the prices of a basket of goods which remains fixed over a lengthy period of time does serve as a useful measure of the dimensions of the inflation problem with which government economic policy must contend. However, the GNE implicit price deflator, especially for personal consumption expenditures, is a much better measure of the degree of actual hardship inflicted by inflation upon those on fixed incomes.

ii) The popular impulse to index incomes to the CPI too often reflects a failure to recognize that on occasion the citizens of Canada may have to absorb a cut in their real incomes as a result of unfavourable change in the terms of trade which we face: whether from higher prices of OPEC oil, from a fall in value in the Canadian dollar relative to foreign currencies, from higher farm prices after crop failures due to bad weather, or from steeper interest rates pushed up by international inflation. In fact, in 1978 and 1979 the incomes of Canadian workers did fall behind the rate of inflation for reasons such as these. Protecting some income earners from these overall economic forces by full indexing — contained in either statutory programs or private collective agreements — would simply raise the sacrifice in real income which would be required of other Canadians. If we try to protect everyone by pushing indexing even further, then in effect no one will be protected, and the dimensions of our inflation problems will be exacerbated even more.

I do not suggest that workers' compensation pensioners should be singled out as the sacrificial lambs in a tougher battle against inflation, while those of us in the active work force use our market or collective power to insulate ourselves from these economic forces. Instead of jettisoning the notion of indexing, we should seek a better criterion for adjusting pensions to inflation. One logical candidate is the movement in average industrial wages. This is a more accurate index of how employers and employees in general react to the trends in our economic environment. If this measure would hold workers' compensation claimants somewhat behind the higher CPI (as it would have in the last two or three years), the result is that disabled workers would have to share in a general economic belt-tightening. On the other hand, use of this measure might well produce larger adjustments in workers' compensation benefits than the CPI would have (and, indeed, would have done so in the last two decades). Such a formula would extend to workers' compensation claimants the benefit of the long-term growth in productivity and per capita GNP as well as requiring the same sacrifices resulting from periodic changes in the real output of the Canadian economy as are made by employed workers. As well, a fair argument of principle can be made that this is the right criterion in terms of compensation theory. The purpose of workers' compensation is to compensate disabled workers for the wages which they have lost from work, to provide redress for their inability to share in the real wage gains they would have achieved if they had remained actively employed. It is for this reason that I propose that the minimum and maximum benefit levels be expressed as a function of the average wage in the Ontario economy. The wage levels which are to be the basis for compensation benefits for newly-injured workers will move freely upwards or downwards in tandem with the natural economic forces in our labour market.

I am not convinced that the same measure is appropriate for permanent disability pensioners. There are difficulties in measuring average wage movements, and in isolating changes in the composition of the employed work force which might produce artificial indicators of wage changes in particular industries. (This is a minor problem in connection with new claims, since the injured worker will carry with him his own current wage rate as a precise measure of what he has lost; the point of indexing a ceiling is simply to remove the latter as an artificial barrier to use of this realistic figure.) More important, I do not see why long-term workers' compensation pensioners — the totally disabled or surviving dependents — should be treated differently from the old-age pensioners whose incomes are typically adjusted to the Consumer Price Index. All these people are permanently removed from the labour force, their primary reference point is their actual standard of living rather than the earnings of fellow workers, and they need the security of protecting that real income from the vicissitudes of economic life. (I should add that one effect of the changes which I proposed earlier in the structure of benefits — in particular, for permanent partial disabilities and survivorship — would be to confine long-term compensation pensions to the single situation of involuntary retirement from the workplace.) In my view, the primary criterion for adjusting these pensions should be changes in consumer prices rather than changes in industrial wages (although I suspect that in the next decade or two there will not be a significant overall difference in the two).

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As I mentioned earlier in this Report, and as I shall describe in detail in the next chapter, Ontario business is the immediate source of funds for financing workers' compensation. On the face of it, there seems no reason why inflation should change that. In macroeconomic terms, just as inflation generates the need to adjust the level of workers' compensation benefits, so also should it provide the increase in Workers' Compensation Board revenues from payroll assessments or investment earnings. The major complication in this analysis is that workers' compensation pensions in this province are not fully funded. On the surface, they might appear to be about 80% funded, but this is so only on artificial actuarial assumptions. Considered more realistically, the Board's compensation pensions are only about 50% funded. This does not mean that the system is fiscally unsound. Workers' compensation is a statutory program. The Board has the legal authority to increase its levies to meet any shortfall in revenues. Sometimes people worry that future economic woes will make it impossible to live up to our commitment to injured workers, but if this ever proves to be true, we cannot assume that the investment portfolio of even a fully-funded system of workers' compensation would escape unscathed from such economic disasters. This does mean, though, that the program cannot generate out of its own investment revenues the money necessary to pay for all inflation-induced increases in pension benefits. In fact, as might be expected, a half-funded system will produce only about half the needed money.

Ontario employers sometimes argue that this shortfall should not be made up out of increases in the current assessment of business. Rather, it should come from the Province's Consolidated Revenue Fund (thus ultimately from the Ontario taxpayer). Such a step is both inconsistent with the basic model of workers' compensation and unlikely as a political matter. If this were the only alternative, I would propose immediate full funding of workers' compensation pensions to insure them protection from inflation. Such a move towards full funding would have this further implication — a drastic increase in the amount of money which the Workers' Compensation Board would siphon from the coffers of the business community (on the order of another two billion dollars). Instead of being available for investment by the private entrepreneurial sector, this capital would have to be disposed of by public officials in accordance with a necessarily conservative investment program.

When that prospect was pointed out to them, the Ontario business leaders to whom I spoke shied away from full funding by the Workers' Compensation Board. They believe that the prospects for economic growth in this province are enhanced by entrepreneurial rather than governmental control of this huge pool of capital. If this is so, there is no reason why the government should pick up the additional cost of adjusting pensions to inflation in a partially-funded program. I would treat the gap in the funding of workers' compensation pensions as an implicit loan by the Board to the employers of Ontario. The opportunity cost to the Board from this "loan" is the revenue which these funds would have generated at prevailing interest rates. In calculating the funds available to meet the cost of inflation adjustment, we must count these notional earnings on the funds left with the employers as well as the actual earnings on the portfolio in the hands of the Board. Viewed in this manner, the system of financing workers' compensation *can* afford the bulk of the cost of protecting compensation pensioners against the ravages of inflation.

I appreciate that, while this equilibrium between the inflation rate and the interest rate is one towards which the economy tends, it is unlikely that the two will match precisely in any one year. The Workers' Compensation Board's investment portfolio is composed of securities of different types and durations. Thus, in years when inflation suddenly spurts ahead, it will outpace the rate of return on existing securities. Such a shortfall did occur in the yield on the Board's portfolio in the period of unanticipated double-digit inflation from 1973 through 1975. On the other hand, when the rate of inflation turns down, the Board reaps a surplus on longer-term securities purchased during the earlier, higher-inflation period (as did happen from 1976 through 1979). My analysis of how we might affordably adjust compensation pensions to inflation rests, then, on the premise that there is a rough equivalence in inflation rates and interest rates over the longer run.

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Let me summarize my proposals for adjusting pensions to account for inflation. The statutory criteria for current compensation claims should be tied to changes in the average weekly earnings industrial composite. As inflation pushes up these criteria, it will also affect the assessable payroll through which the Board generates the money to pay for these current claims. On the other hand, long-term pensions awarded by the Board should be adjusted annually in accordance with the changes in the GNE implicit price deflator for personal consumption expenditures.* The funds to pay for these adjustments should come from a combination of the actual earnings on the Board's investment portfolio together with the notional earnings on the unfunded portion of its pension liabilities. (The latter figure should be measured by the chartered banks' prime business loan rate, and the money should be recouped through current assessments.)

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*These proposals for adjustment of pension benefits to inflation, like the other recommendations in this chapter, are put forward as the model for fair and sound disposition of future compensation claims. No attention was paid in the course of my Inquiry to the question of which if any of these proposals is to be applied retroactively to existing pensions. I have not worked out in my own mind a detailed blueprint for the transition into the new system, if and to the extent that this is to be the will of the Legislature. On the other hand, some issues, particularly that of inflation adjustment, cannot be avoided. Nor is there any entirely happy way to treat

Every year the Workers' Compensation Board would calculate the changes needed in the nominal value of existing pensions in order to maintain their real value. The Board would also calculate the amount of money available from within the system to pay for these adjustments. In a year in which there is an inflation surplus, this should be carried on the Board's books; in a year in which there is an inflation deficit, this should be paid for out of any such surplus. If there are persistent deficits over a period of years, so that the system cannot generate the revenues to pay for all the costs of pension adjustments, this gap should *not* be the responsibility of Ontario employers. Instead, the Act should direct the government to supply the extra money needed from its Consolidated Revenue Fund. Among other things this should help guarantee that the Board can stay with its current investment philosophy, in which it seeks the maximum economic return on its pension funds rather than let the provincial government tap this money for artificially low-interest loans.

Much earlier in this section I stated that there could be no denying the principle that compensation benefits must be regularly adjusted to keep pace with the rate of inflation. The only issue for debate was how to do so. I favour this relatively complex system for defining precisely how much the benefits should be increased, and how this should be paid for. If this scheme appears unnecessarily complicated, then Ontario should simply follow the British Columbia example, index the entire program to the Consumer Price Index, and be done with it.

G — Conclusion

I have made a considerable number of proposals for changing the structure of benefits of workers' compensation in Ontario. No point would be served by trying to recapitulate them all here. But I do want to make this final observation about the tack which I have followed in this chapter. I have tried to work out the implications of the basic

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the problem. One of the strands of my argument in this chapter is that periodic pensions should be confined by the Board to those cases in which there is an actual wage loss; *inter alia* in order to make the task of inflation adjustment more manageable and less threatening. But the vast majority of existing Board pensions are now paid to people who are fully back at work (or who are receiving disability pensions or retirement income). On the other hand, these pensions were awarded under a legal framework which gave no guarantee of protection against future inflation. My own inclination is to follow the lead of Saskatchewan on this issue, and to confine the right to inflation adjustments to those existing pensioners who come forward to establish that they are suffering an actual loss of net disposable income according to the criteria for the new structure of benefits.

principles of workers' compensation as applied to the variety of claims and issues presented to the Workers' Compensation Board. Sometimes my reasoning has led to the conclusion that the existing benefits must be improved in order to provide a fair level of income support to people who are unable to work because of an injury. At other points, I have been persuaded that the current system of benefits must be trimmed, either to take account of other benefit programs or simply because the injured worker is and should be back at work supporting himself. In either case, I have spelled out each step in my argument from premise to conclusion so that the reader can evaluate its cogency for himself. But it would be a mistake to treat these issues and proposals in isolation from each other. My recommendations are intended as a comprehensive package to rationalize what has to be an integrated benefit system. I hope that they are appraised in terms of whether, taken as a whole, they produce a sensible accommodation of the needs of the victims of industrial accidents for a decent level of income and the interests of those who remain in the active labour force and ultimately foot the bill for workers' compensation.

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Financing Workers' Compensation

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Workers' compensation is financed entirely by assessments upon employers doing business in the province. Thus it stands in marked contrast to other public programs for income maintenance, which draw on either the general taxpayer (e.g., social assistance) or in part on contributions by individual workers (e.g., unemployment insurance). In this respect, workers' compensation in Ontario embodies the same principle established 60 years ago and followed by all other jurisdictions in Canada. There is a clear historical rationale for this component of the program. Workers' compensation was intended to replace the common-law tort liability of the employer to its employees. It was only natural that business absorb the cost of the new system of strict statutory liability. But, as I have emphasized earlier in this Report, we should be under no illusion about the ultimate incidence of the cost of the program. Employers serve as a conduit through which most of the bill for workers' compensation is passed forward to the customers or backward to the employees of the enterprise. Still, this form of financing workers' compensation is not neutral in its economic impact. Depending upon their market situation, different businesses will react in varying ways to increases in assessment rates. More important, the assessment system provides us with an opportunity to use the price mechanism to influence management to invest money and effort in occupational health and safety, to use its control over the marketplace to optimize accident prevention. In this chapter I shall consider a recent proposal for mandatory experience rating of an individual employer's safety performance as the vehicle through which workers' compensation might contribute to this goal.

First, some general background on this assessment system. Due to the sharp increase in size of assessments in the past decade, employers are more aware of and concerned about their role in financing the program. The average assessment of Ontario employers as a whole was 1.14% of assessable payroll in 1970. By 1978, the average assessment rate had risen as high as 1.97%. This was its peak. By 1980, the assessment rate had dropped to 1.65%, a figure which is still sharply higher than it was ten years ago (and it is going up again to 1.72% for 1981). Moreover, these are *real* increases in compensation costs, expressed as a percentage of current total labor costs, not just increases in the absolute assessment bill which might be dismissed as merely inflation-induced changes in nominal values.

A number of factors appear to have fueled this growth trend, including these:

i) There have been improvements in the legal scope of the benefits (e.g., the development of temporary supplements for actual wage losses which are not recognized in purely clinical rating of permanent partial disabilities).
ii) The percentage of claims which eventually are allowed by the Workers' Compensation Board has gradually risen in the past decade.
iii) There has been substantial growth in the Board's staffing — for rehabilitation, decentralization, more extensive appeals, *et al.* — all of which combines to increase administrative costs from 6.8% of the assessment dollar in 1970 to the current 8.5% share.
iv) The emergence of double-digit inflation in the Seventies, and the eventual recognition that something had to be done to stem the erosion of the fixed pensions of disabled workers, meant that assessments had to increase in order to pay for these inflation-linked adjustments, and also to expand the funded status of the existing pensions in order to generate the investment revenues needed to pay for future inflation adjustments.

Whatever be the reasons for the increase in the real cost of workers' compensation assessments, the significance of this component of overall labour costs has become evident to corporate comptrollers.

The distinctive structure through which workers' compensation is financed by employers is just as important as its overall cost in shaping the views of employers about the system. A business is not assessed individually for the cost of the injuries caused to its employees in its workplace. Rather, workers' compensation has always been designed as a form of collective insurance of employers as a group against the risks of industrial injuries. There is an exception which serves to exemplify the rule. Schedule II of the Workers' Compensation Act provides that a number of large businesses (such as the Canadian Pacific Railroad) or public bodies (such as Metropolitan Toronto) will have their injured employees compensated by the Board according to its criteria and procedures, but that the cost of these benefits will be assessed individually to each employer for the total annual bill attributable to its operations. This kind of self-insurance is not available to the vast majority of employers in the province — even such giants as International Nickel, Steel Company of Canada, or General Motors. The theory is that collective insurance is needed in order to avoid a threat to the financial soundness of the typical employer from the chance occurrence of a number of serious industrial accidents in one year. Otherwise, one might risk bankrupting smaller firms and even endangering the ability of the injured worker to collect his compensation. On the other hand, while the Act clearly opts for collective employer liability, it does not assess each employer an equal proportion of its payroll base to cover the overall cost of the program. This so-called "postage stamp" model for insurance rates is now being considered by a number of compulsory, government-run, strict liability motor vehicle insurance schemes which have emerged in Canadian provinces. As far as workers' compensation is concerned, though, such an alternative is considered incompatible with the need to allocate the cost of injuries in a manner which is roughly commensurate with the degree of risk associated with different industries and different jobs. Right from the beginning, Canadian workers' compensation followed the tradition of the insurance industry, developing a variety of industrial rating groups in order to assess the employers whose business is classified in each such group with their share of the collective cost of the injuries allocated to their respective rating group.

This has required a rather elaborate scheme. Some 155,000 employers doing business in Ontario are assessed by the Board every year. Each year fully 20,000 new firms come under the umbrella of the program and another 20,000 leave. Each of these employers must be placed in one of 108 rating groups. One such "group" is as small as one employer with a twenty-million-dollar payroll. At the other extreme is construction, an industry with over 24,000 employers, two billion dollars in payroll, and about 100 million dollars in annual assessment. Indeed, construction itself is broken down into a total of eleven rating groups which may apply to one or another part of a contractor's business (e.g., tunneling, electric wiring, or bricklaying).

Within such a scheme there can be difficulties in aptly classifying a firm whose operations may lie at the boundaries of several different rating groups. Nor is this an idle academic exercise. The average assessment figure I noted earlier — 1.65% for Ontario employers as a whole — conceals a wide range in the actual percentage assessment for different rating groups. The real figures range from a low of one-fifth of one percent of payroll for the accounting group to over sixteen percent for the business of loading and unloading cars. Within the construction industry alone, assessment costs now range from three percent (for mechanical work) to nearly fourteen percent (for demolition).

Any "tax" system which sets out to classify 150,000 businesses into one of more than 100 widely-varying rate categories will naturally raise serious issues of equity. In my Inquiry these concerns were expressed particularly by the Council of Ontario Contractors Associations (COCA) and the Construction Safety Association of Ontario (CSAO), two bodies which represent employers in the construction industry. This industry is a microcosm of the larger problem. As I mentioned, construction in Ontario has over 24,000 employers, allocated by the Workers' Compensation Board across eleven different rating groups, of which the highest assessment rate is five times as large as the lowest. This disparity provides more than ample incentive to try to manipulate the system by having as much of one's business and payroll as possible classified according to the lower rate. For a variety of reasons — financing, taxation, investment risk, and so on — construction firms have tended to spin off separate companies for new projects. However, this practice also provides an opportunity for a firm to liquidate its compensation liabilities for a project which has had a poor safety record. Back in the Fifties, construction labour relations encountered many of the same problems. Labour law reformers developed such new statutory concepts as the "associated company" and the "successor employer" to permit Labour Relations Boards to handle these problems in a pragmatic and equitable way. The Workers' Compensation Board should be given analogous statutory resources.

Another problem of equity between employers concerns funding for permanent disability pensions. In my earlier discussion of inflation, I noted that the system is now only about half funded, given realistic assumptions about inflation, interest rates, and future adjustments to pension benefits to keep them abreast of rising prices. This does *not* pose a threat to the fiscal soundness of the program. It simply means that the Board must use its power to levy assessments in later years to meet future liabilities on a "pay-as-you-go" basis. The main virtue of this policy is that the Workers' Compensation Board does not drain out of the private sector massive amounts of capital (amounting at this time to another two billion dollars which would be needed for full funding of current liabilities).

Such a judgment is valid if one considers business in the aggregate. Whatever method of financing is chosen, business will pay: either all at once in fully capitalized pensions, or out of current assessments to meet pension liabilities as they rise. But "business" in this sense is actually composed of thousands of new employers entering the economy every year, while thousands of old employers are leaving.

The implication of under-funding is that new employers must bear the cost of the under-funded liability of the program to the casualties of the older firms. In my view, a requirement of total funding (on the basis of realistic assumptions about inflation adjustments) would be much too drastic a response to the problem of equity between generations of employers.* But I think serious consideration should be given to empowering the Board to fully capitalize the liability for previous injuries and disability pensions as and when a firm goes out of business or simply leaves the province. The statute could make this a preferred charge on the assets of the firm before they are distributed to its owners.

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These issues were not a central focus of my Inquiry. Thus I have canvassed the concerns and proposals somewhat sketchily, in the hope that this will evoke a broader response and critical analysis. There was another aspect of the financing system which was a common refrain in the briefs and submissions which I received. This concerned a proposal to refine the system of assessment of industrial rating groups by mandatory individual experience rating. As its name indicates, experience rating (or merit rating, as it is also called) is a modification of the basic model of collective liability. The Board would calculate the accident and compensation experience of the individual employer, and would vary this employer's assessment through either a surcharge or a refund, depending upon the direction in which the individual firm deviated from the average of the group. Shortly before I was appointed, the Board had circulated a proposal for a new mandatory experience rating plan. The desirability and design of this plan was the subject of considerable comment in my Inquiry.

The justification offered for such a plan is obvious: the reduction of industrial accidents and their costs. It is the employer who is in control of the workplace. Its senior management must be influenced to pursue industrial safety. But accident prevention costs time and money, often a sizable investment in employee training, closer supervision, better equipment, even radically new technology or organization. As well, rehabilitation of the injured worker — which can drastically reduce the economic and human toll of accidents which have already occurred — normally requires some expenditures to accommodate the operation and the workplace to the special needs of the disabled. Yet business reacts to economic incentives. It is only natural that it will want to realize a return on these investments. The problem with financing workers' compensation through collective assessment of the industrial rating group is that any reduction in the cost of compensation realized by the extra efforts of the single firm will accrue to the benefit of the entire group. Those firms who are cavalier about occupational health and safety, who may be tempted to save money at the risk of their employees' well-being, will share equally in the benefits of safety investments made by their competitors. Businessmen feel much the same sense of grievance about the inequity of permitting such "free riders" as, for example, do union leaders about employees in a bargaining unit who refuse to pay union dues. An individual experience rating plan can be the instrument through which workers' compensation may be modified towards a fairer allocation of the costs of industrial accidents among employers as a group. Presumably, it will also provide business with a structure of incentives which favour, rather than hinder, investment in accident prevention and vocational rehabilitation.

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*One often-overlooked virtue of the current system is that the Workers' Compensation Board is able to invest implicitly in small firms in a manner it could never do with its actual investment portfolio, which is composed of comparatively gilt-edged securities.

Almost every group which appeared before me — employer, union, and injured worker — favoured mandatory experience rating. Still, we must not ignore its potential costs. Computing experience ratings will require sophisticated calculations which will impose additional work on the Board's already over-burdened computer. It may generate further contention and litigation under the statute, not so much about the application of more complex rating formulas as about individual claims whose validity employers may be more inclined to contest because of the immediate impact on their own costs.*

At the same time, I have not seen any systematic studies which demonstrate that merit rating, where it has been tried, has produced markedly safer workplaces. And there are observers of the system who believe that the dollar amounts involved in workers' compensation assessments (and thus in surcharges or refunds) are not large enough to tip the balance towards the kind of investment in safety which is needed for a real breakthrough in prevention of industrial accidents, much less industrial diseases.

While we do not have the benefit of scientific proof, proponents of experience rating can appeal to the intuitive, common-sense view that business executives will pay attention to the promise of a refund or the threat of a surcharge in Board assessments.* This is one tangible way to give those responsible for an employer's safety record a more prominent voice inside the executive suite. At the minimum, one can hardly argue against the addition of experience rating to the current model of assessing employers in a variety of rating groups. We do not have a single flat-rate assessment of all employers in Ontario (using, say, the current overall average of 1.65%). Instead we have adopted a system which charges uranium mining companies, for instance, 11.25%, but insurance companies only 0.20%. This is done in recognition of the vast difference in the accident toll of producing their respective goods and services, a disparity which should be reflected in the relative prices paid by consumers, the earnings of workers, and the rate of return on capital in these industries. That step taken, we can hardly deny that there is likewise great variation between different mining companies or contracting firms — in terms of their geography, plant, equipment, supervision, safety programs, *et al.* — which can profoundly affect the size of the compensation bill generated by these firms.** At the instigation of the Joint Consultative Committee, and in collaboration with a number of employer organizations, the Workers' Compensation Board has been developing an experience rating plan which it proposes to make mandatory for all Schedule I employers. The vast majority of union and injured worker groups endorses that step. I firmly recommend that individual experience rating now be made the rule rather than the exception in Ontario workers' compensation.

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*I believe this concern is somewhat over-drawn. We already have some experience with merit rating under workers' compensation in Ontario. There is a modest plan available now under the Act, one which is voluntary in the sense that it comes into effect only when chosen by a majority of the relevant rating group (and now covers 41 of 108 such groups, although only 13,000 of 145,000 employers). More instructive is the case of Schedule II employers who are totally individually rated and self-insured. My inquiries disclosed no evidence of comparatively greater conflict about claims by the employees of these firms.

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It is one thing to adopt the principle of merit rating; it is quite another to decide precisely how to do it. We have three objectives in mind, often in a state of tension with each other. First, we must define with some precision the appropriate costs which will be allocated to the individual employer, those which will maximize the incentives toward safety (and not those which will deter hiring and rehabilitation of handicapped workers, for example). Yet, secondly, we must not go too far towards eliminating the insurance feature of the workers' compensation system. There is a high element of chance in industrial accidents. Notwithstanding some of the moralistic rhetoric, the program does not assume that it is because the employer is at fault that an injured (and occasionally careless) employee is to be compensated. A single serious and fortuitous accident can significantly distort the compensation picture of an employer, particularly a small firm whose overall experience is insufficient to give much credibility to a deviation from the average. Finally, though, we cannot become too sophisticated in reconciling the conflicting goals of collective insurance and individual responsibility. The system must be kept relatively simple; not just to ease the administrative burden upon the Board but also to keep it comprehensible to the average businessman, whose appreciation of the fairness of the financing mechanism we are trying to reinforce.

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*The case is reminiscent of the debate about criminal punishment. At least until recently, there was little scientific evidence for the deterrent impact of criminal sanctions. But society has been willing to operate on the popular belief that the prospect of punishment for the criminal offender will tilt the balance enough in favour of compliance with the law to justify imposing the penalty.

**Indeed, experience rating is a useful device for smoothing out the anomalies and inequities in our current classification system, which must squeeze a vast number of employers into a small number of rating categories. In the long run, the plan can produce the information for sensible refinement of the current classifications and rates.

One important issue highlights these difficulties better than any. Should the plan place its emphasis solely on the aggregate costs of the compensation benefits paid to the employees of an employer in any one year? Or should it take account as well (even primarily) of the employer's accident frequency in that year? For example, should a small employer which suffers one serious accident in the year, a permanent total disability which will cost the program $200,000, be surcharged on the basis that it is twice as unsafe as another employer of the same size whose employees suffered ten lost-time accidents during the year, averaging $10,000 each, for a total of $100,000 in compensation? The proposed Board plan, one which was endorsed by the Canadian Manufacturers' Association, the Ontario Mining Association, and a number of other employer groups, does just that. A number of arguments are advanced to justify relying on aggregate cost of compensation only, and ignoring comparative accident frequency:

i) The point of experience rating is to allocate the cost of compensation through employers' assessments. The Board already has in its possession the relevant information about employer payrolls and the total compensation bill, making calculation of above- or below-average cost experience relatively simple and straightforward. As well, reliance on this figure to provide the incentive to employer safety is consistent with the typical businessman's concern about the bottom-line cash payout.

ii) If the Board were to move instead to a frequency index, it would have to generate further data from employers — in particular, the total hours worked by their employees during the year — in order to calculate relative accident frequency. Even worse, reliance on pure frequency in this fashion might give some employers an initiative not to report small accidents — to have the medical bills paid through OHIP and the employee kept on the payroll for short periods of time loss, which might come back to haunt the employee if the injury were to recur later on. And if the Board proposed to do a more sophisticated job of melding frequency into the program — perhaps by using a point system to rate each claim, from one point for a pure medical aid claim to twenty points for a fatality — such a scheme would prove highly complex and difficult to communicate to the typical employer.

iii) In any event, Board calculations indicate that on average there is a correlation between accident frequency and aggregate compensation costs for most employers in any one year.

While these arguments are plausible, they are not ultimately persuasive. One can hardly deny the tremendous distortion which can be produced by a single chance accident. Take the case of two contracting firms, each of which has experienced the same type of accident in a year. One accident has permanently and totally disabled a 25-year-old skilled tradesman who had earned $30,000 the year before. That unfortunate event will cost the Board a million dollars in benefits, which would be attributed to this firm's account for the purposes of merit rating. The other firm's accident killed a 25-year-old tradesman who left no dependents, an event which will cost the program only $1,000 in burial expenses. The first firm would pay the maximum surcharge; the other would receive a refund. But the ultimate cost the two accidents was entirely fortuitous and beyond the control of either firm.

Nor is this type of incident rare. Figures produced by COCA and CSAO show that in construction, in any event, the indices of accident frequency and aggregate compensation costs diverge about 30% of the time. This means that a good many firms with consistently poor frequency records would receive substantial refunds, while a corresponding number of firms whose accident records were regularly below average would be surcharged because of the impact of one or two serious accidents. In my view, accident frequency is the better measure of comparative safety efforts and investment by employers. In the example I mentioned earlier, it is obvious that the firm which experienced ten accidents in a year, each with substantial lost time, is far less safe than the one which experienced only one accident, the ultimate cost of which was double the total compensation bill of the first employer.* Thus, it seems consistent neither with safety nor equity to ignore this in the design of our experience rating plan.

The current Board proposal does try to smooth out the skewing effect of the occasional costly accident. It does so by adding two qualifications. First, the experience rating plan will count only 50% of the difference between actual and expected (or average) accident costs for purposes of determining the size of a refund or a surcharge. Second, the plan will impose a limit on even that surcharge, amounting to a maximum 50% hike in its next assessment bill from the Board.

I am concerned about this watering-down of the maximum size of the surcharge in any one year. Initially the Board had proposed a limit of 100% of the previous year's assessment; i.e., permitting a doubling of the assessment bill for a poor compensation record. The main reason for lowering the ceiling to the 50% level was the argument presented by COCA, CSAO, and others about the distorting effect of the single serious accident on the merit rating of small employers. The problem with this response by the Board is that it considerably dilutes the potential impact of the merit rating plan in spurring poor employers on to extra safety efforts.

I much prefer an alternative solution. The cost of all serious accidents in a year, within each industrial rating group, should be averaged together by the Board. Only that average cost should be imputed to the individual employer who experiences such an accident, for purposes of calculating its merit rating.** In my discussions with COCA and CSAO, they agreed that this refinement would smooth

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*This is not to suggest that accident seriousness, as measured by overall cost, is irrelevant to safety performance. As I shall propose later on, an adequate plan should take account of both accident frequency and aggregate cost.

**By serious accidents I mean those which produce fatalities or permanent disabilities, whether partial or full. Assuming that my proposal for a new structure of benefits is to be adopted, this would mean that the Board would average together in any one year the capitalized costs of survivorship benefits (whether lump-sum payments or long-term earnings-related pensions) and the lump-sum payments and/or actual wage loss benefits for permanently disabled workers. I realize that it will be impossible for the Board to estimate with precision the actual wages which would be lost as a result of any one partial disability case. Rough judgments will have to be made at the outset for purposes of experience rating, judgments which can be refined as the Board develops its experience under the new system (as it will have to do in order to capitalize the costs for its basic assessment rates). At the same time, I favour averaging the cost of actual wage-loss benefits for permanent partial disabilities *only* if my earlier recommendation about the responsibility of the original employer for rehabilitation is accepted. Unlike the aggregate cost of a fatal accident or total liability claim, the total cost of permanent partial disabilities is not beyond the control of the employer even after the original accident has occurred. An employer can often sharply limit the cost of such an accident — whether its economic or human cost — by engaging in sustained and imaginative efforts in vocational rehabilitation of its disabled workers. A great deal of attention is paid in the design of the workers' compensation program to maximizing the incentive of the employee to make the adjustments necessary for a return to work. It is just as important to maximize the incentive felt by individual employers to co-operate in this out almost all the distortions of a single chance event on the record of an employer with a below-average accident frequency.* Having done that, I believe the Board could safely reinstate its initial proposal that the ceiling on surcharges of less safe employers be lifted back up to 100% of the previous year's assessment bill. In this way the system's impact on accident prevention will be enhanced, while a reasonable cap is retained in order to avoid endangering the financial soundness of these employers.

Under the Board's current proposal, entitlement to a refund or liability for a surcharge is to be based on a deviation from the average experience over a period of three years. This is a sensible accommodation of the need to eliminate the statistical volatility of only one year's experience and the need to keep surcharges and refunds comparatively close in time to the events (and the existing management) whose conduct is to be influenced by the plan. In that connection, I observe that it is also necessary that the costs of permanent long-term disabilities be fully capitalized in the year of their occurrence (or in the year the injury becomes stabilized) for purposes of calculating the employer's experience rating.** If this policy is adopted, then any inequities which remain notwithstanding my averaging proposal would work themselves out of an employer's record at the end of three years, at the latest.

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effort. In Chapter Three I proposed that if an employer does have available suitable work which could be performed by the disabled employee (in the opinion of the Board), then it should offer the employee that work or be assessed for all of the net actual wage-loss benefits which the Board must pay to that claimant. If this proposal is not adopted, then, at the minimum, the costs of this permanent partial disability benefit should be fully included in the employer's record for purposes of experience rating, not reduced to an industry-wide average as would be done with other serious injuries.

*In fairness to CSAO, I must add that while it is pleased with this proposed alteration of the Board's proposal as far as it goes, it still would like to have an explicit frequency modifier in the experience rating plan. I am not prepared to recommend that this be a part of the Board's general scheme. The vast majority of employer groups in the province are not sympathetic to the notion, which has certain problems mentioned here earlier. On the other hand, I see no reason why the Board might not implement a somewhat different scheme in construction. This is a sufficiently sizable and significant industry that it could receive specialized treatment from the Board if in fact CSAO is right about what its constituents — as well as the construction worker and his building trade union — want. This kind of pluralism in the ingredients of the program might well provide some illuminating evidence about whether and how experience rating best influences employer behaviour.

**By this I mean that the liability should be capitalized in notional or accounting terms, not that the Board should require immediate financial payment of the capitalized sum.

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The issue of frequency versus cost is the most important one to face in designing an experience rating plan. A number of other significant points were raised, and my views about these have been communicated to the Board, so there would be little point in developing them in this already lengthy Report. I close with a final observation. The system for financing workers' compensation is, potentially, a highly useful lever in the pursuit of accident prevention. Once in place, it can be used to reward employers who adopt new safety programs or to penalize those who violate specific safety standards. But at the present time, judgments about the efficacy of such variations in compensation assessments rest more on hunch than on systematic proof. In the absence of more tangible evidence, though, it is reasonable to proceed on the footing of common-sense assumptions. However, I believe it would be irresponsible to miss the opportunity afforded by the introduction of this new merit rating scheme for enhancing the state of our knowledge for the future. As I have already suggested with reference to other proposals, before this new policy is actually implemented, an evaluation study should be developed (perhaps in tandem with the safety associations) to monitor its impact on employer behaviour in order to provide the Ontario public and policy makers a more informed basis upon which to appraise and use experience rating in the future.

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Let me summarize my conclusions in this chapter. Workers' compensation should continue to be financed out of assessments on business, rather than through levies on employees or on the general taxpayer. The size of these assessments should vary not simply with the hazardousness of different industries but also with that of individual firms, whose experience would be merit-rated under a new mandatory plan. The current extent of funding of the program, roughly half capitalized and half "pay-as-you-go," can be safely maintained. However, given this degree of under-funding and the emergence of full-fledged experience rating, the Board should be provided with the legal tools to insure that a firm discharges its obligations to the compensation fund if and when it leaves the industry or the province.

4

The Structure of Decision-Making in Workers' Compensation

A — Introduction

The area upon which I have so far dwelled in this Report — the structure of compensation benefits — is the heart and substance of the workers' compensation program. These are the issues emphasized in scholarly studies, government inquiries, and law reform agendas — and rightly so. Strangely, perhaps, they were not the primary focus of the submissions which I received from injured workers and their representatives; rather, these groups were most aggrieved by the *administration* of workers' compensation in Ontario.

To a considerable extent, these administrative frustrations reflect an ailing substantive program. Any system of workers' compensation must have some outer boundaries, limiting the entitlement to or extent of the benefits payable. As we have seen, a number of these restrictions now appear antiquated. I have proposed a variety of profound changes in those ingredients of the program, especially for permanent partial disabilities, the perennial sore spot in workers' compensation everywhere. From one perspective, these changes might be expected to relieve the Board of the criticism which comes from having to render an unjust decision. We should be under no illusions of total success in that regard. Ironically, the more generous the Legislature makes compensation benefits, the more vigorous will be the objections from those people who cannot establish or sustain entitlement to them. Someone has to tell the unsuccessful claimant that his claim has been rejected or that his benefits must be cut off. The Workers' Compensation Board is obliged to enforce and apply legal conditions enacted by the elected legislature. Perhaps the most crucial such condition is the limitation of compensation to *occupational* injuries. Unfortunately, the rationale of these restraints is not nearly as persuasive as it might have seemed 65 years ago. To the Board falls the unhappy lot of having to deliver that message to the worker. The Board does not do this very often, at least not in proportion to its overall caseload. Of those cases which fall within the outer boundaries of its jurisdiction — brought by employees of employers covered by the statute — the Board rejects less than two percent on the grounds that there is no compensable injury. But that statistical ratio cannot mask the harsh fact that in several thousand cases a year, the Board feels compelled to reject a claim, often made by a person whose plight is serious and whose request is sympathetic.

Still, the litany of complaints about Board administration cannot be totally explained in this fashion. Even successful workers' compensation clients often exhibit great discontent with their treatment by the system: with cheques that do not arrive, with files that are lost, with letters which arrive like a bolt from the blue to inform them that their benefits have been cut off, with proceedings which seem to stretch on forever. Underlying these difficulties is a growing feeling that the Workers' Compensation Board has become a faceless, impersonal, even dehumanizing organization, one which puts injured workers through a mail-order assembly line.

To a great extent this evolution of workers' compensation was inescapable. When the Workers' Compensation Board was first created in 1915, it disposed of 17,000 claims and paid out one million dollars in benefits. The Board, headed by four members, had a total of 56 employees. No claim could be granted by a staff employee without first being personally reviewed and approved by a Board member. Now 65 years old, the Board has become a vast governmental machine. In 1979, assessments were raised from 155,000 employers to pay benefits of over 400 million dollars to 460,000 claimants. This task required an organization of 3,000 employees, and an administrative budget of nearly 65 million dollars. To process this ceaseless flow of cases — nearly 2,000 every working day — a bureaucratic form of administration had to be devised. An elaborate structure of claims adjudication and appeals has been established. Inevitably, the Chairman of the Board and his Vice Chairman of Administration, charged with the responsibility of running this huge organism, are remote from the disposition of individual claims.

Critical appraisal of proposals for change in the current system must begin with appreciation both of its massive size and the multiplicity of goals we must have in mind in the design of any legal procedure. I referred to them earlier as the values of economy, reliability, and legitimacy. The system must be *economic* in the use of the time and money of the participants. Clearly, speedy disposition of workers' compensation claims is essential. An injured worker, deprived of the paycheque from his job, needs to have money for himself and his family to live on. Yet there must also be limits on the number of Board employees available to respond to such claims. We want to spend as many of the Board's revenue dollars as we can on benefits, not to have this money diverted to personnel or other overhead costs. At the same time, the Board's judgments must be *reliable*. Serious permanent injuries can produce claims worth a half-million dollars in benefits paid out over a lifetime. These claims deserve painstaking investigation, full information, and the application of well thought-out policies. Moreover, we want these criteria applied consistently by any one of the many Board adjudicators who might draw a particular file. Yet it has become apparent in recent years that not even the most reliable, the most economical administration of workers' compensation will suffice. Worker groups insist on the fundamental principle that claimants for compensation must be treated fairly, and that they must be given a full opportunity to make the best case they can to the Board. The manner in which the Board proceeds must engender a sense of confidence in its decisions, must give a legitimacy to its rulings, which renders them tolerably acceptable even when they are adverse.

Therein lie the seeds of our dilemma. There is a real sense of grievance on the part of some injured workers and their representatives. If left to fester, it will further erode the worker's confidence in a program which, by any comparative standards, must be considered a decent and generous one. But we must be careful in proposing change in any complex administrative organism, however well-intentioned our tinkering might be. Each of the virtues of economy, reliability, and legitimacy appears indispensable in the abstract. Unfortunately, there is a tension among them in the operation of any real-life administrative structure. I experienced this first-hand when I chaired the new B.C. Labour Relations Board, a tribunal which had to dispose of four thousand cases a year. The dimensions of the conflict between administrative efficiency and legal justice loom much larger in a system which must handle well over four *hundred* thousand cases a year. A streamlined computerized program for processing this flow of claims will not fit comfortably with custom-tailored adjudication of concrete problems. Be that as it may, the demand for natural justice in workers' compensation is not going to go away, nor should it. One symptom is the growing number of appeals, over 3,500 a year internally to the Board, and over 600 a year externally to the Ombudsman. Discontent with the assembly-line approach to a high-volume caseload must be faced and dealt with. Otherwise it will discredit the virtues of even the most sensible of substantive reforms. The challenge is to redesign the system so as to enhance the fairness and the acceptability of Board procedures, while preserving as much as we can of administrative economy.

cases a year, the Board feels compelled to reject a claim, often made by a person whose plight is serious and whose request is sympathetic.

Still, the litany of complaints about Board administration cannot be totally explained in this fashion. Even successful workers' compensation clients often exhibit great discontent with their treatment by the system: with cheques that do not arrive, with files that are lost, with letters which arrive like a bolt from the blue to inform them that their benefits have been cut off, with proceedings which seem to stretch on forever. Underlying these difficulties is a growing feeling that the Workers' Compensation Board has become a faceless, impersonal, even dehumanizing organization, one which puts injured workers through a mail-order assembly line.

To a great extent this evolution of workers' compensation was inescapable. When the Workers' Compensation Board was first created in 1915, it disposed of 17,000 claims and paid out one million dollars in benefits. The Board, headed by four members, had a total of 56 employees. No claim could be granted by a staff employee without first being personally reviewed and approved by a Board member. Now 65 years old, the Board has become a vast governmental machine. In 1979, assessments were raised from 155,000 employers to pay benefits of over 400 million dollars to 460,000 claimants. This task required an organization of 3,000 employees, and an administrative budget of nearly 65 million dollars. To process this ceaseless flow of cases — nearly 2,000 every working day — a bureaucratic form of administration had to be devised. An elaborate structure of claims adjudication and appeals has been established. Inevitably, the Chairman of the Board and his Vice Chairman of Administration, charged with the responsibility of running this huge organism, are remote from the disposition of individual claims.

Critical appraisal of proposals for change in the current system must begin with appreciation both of its massive size and the multiplicity of goals we must have in mind in the design of any legal procedure. I referred to them earlier as the values of economy, reliability, and legitimacy. The system must be *economic* in the use of the time and money of the participants. Clearly, speedy disposition of workers' compensation claims is essential. An injured worker, deprived of the paycheque from his job, needs to have money for himself and his family to live on. Yet there must also be limits on the number of Board employees available to respond to such claims. We want to spend as many of the Board's revenue dollars as we can on benefits, not to have this money diverted to personnel or other overhead costs. At the same time, the Board's judgments must be *reliable*. Serious permanent injuries can produce claims worth a half-million dollars in benefits paid out over a lifetime. These claims deserve painstaking investigation, full information, and the application of well thought-out policies. Moreover, we want these criteria applied consistently by any one of the many Board adjudicators who might draw a particular file. Yet it has become apparent in recent years that not even the most reliable, the most economical administration of workers' compensation will suffice. Worker groups insist on the fundamental principle that claimants for compensation must be treated fairly, and that they must be given a full opportunity to make the best case they can to the Board. The manner in which the Board proceeds must engender a sense of confidence in its decisions, must give a legitimacy to its rulings, which renders them tolerably acceptable even when they are adverse.

Therein lie the seeds of our dilemma. There is a real sense of grievance on the part of some injured workers and their representatives. If left to fester, it will further erode the worker's confidence in a program which, by any comparative standards, must be considered a decent and generous one. But we must be careful in proposing change in any complex administrative organism, however well-intentioned our tinkering might be. Each of the virtues of economy, reliability, and legitimacy appears indispensable in the abstract. Unfortunately, there is a tension among them in the operation of any real-life administrative structure. I experienced this first-hand when I chaired the new B.C. Labour Relations Board, a tribunal which had to dispose of four thousand cases a year. The dimensions of the conflict between administrative efficiency and legal justice loom much larger in a system which must handle well over four *hundred* thousand cases a year. A streamlined computerized program for processing this flow of claims will not fit comfortably with custom-tailored adjudication of concrete problems. Be that as it may, the demand for natural justice in workers' compensation is not going to go away, nor should it. One symptom is the growing number of appeals, over 3,500 a year internally to the Board, and over 600 a year externally to the Ombudsman. Discontent with the assembly-line approach to a high-volume caseload must be faced and dealt with. Otherwise it will discredit the virtues of even the most sensible of substantive reforms. The challenge is to redesign the system so as to enhance the fairness and the acceptability of Board procedures, while preserving as much as we can of administrative economy.

B — Primary Adjudication

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In dealing with this tension between competing values, a natural move suggests itself. Any complex decision-making structure will provide for both primary adjudication and layers of appellate review. Why not let the design of the procedure for original disposition emphasize administrative efficiency in the run-of-the-mill case, while having the appeal system serve as the vehicle for guaranteeing legal justice in troublesome individual claims?

The argument for this division of institutional labour is clear enough. Taken as a class, workers' compensation claimants want a response to their injury and income needs as fast as possible. Those who pay for the system — not just employers, but consumers, workers, and indeed claimants, who would like the most effective use of the scarce premium dollar — want the processing of that claim to cost as little as possible. The vast majority of claims are routine, the answer to them is clear, and a decision on them can safely be made with a minimum of inquiry and information. Thus it would be a mistake to bend over backwards at the initial stage — to double-check all information or to look for lurking complications — when the ultimate payoff for that effort is small, and the result would be delay and expense in dealing with literally hundreds of thousands of cases. Instead, our system of primary adjudication should be designed to mete out quick, inexpensive, but admittedly rough justice. To some extent that has historically been the flavour of workers' compensation in Canada. And the Ontario Workers' Compensation Board is able to get a cheque in the mail to an injured worker in over half of its cases within three days of receipt of the claim, while keeping its overall administrative costs down to near eight cents of the premium dollar.

Meanwhile, the appeal process is available as a backstop for the more complicated case, the one whose facts are murky and whose features do not fit comfortably into existing Board doctrines and formulas. In these cases, of the initial investigative decisions which take a position adverse to that of one of the parties, a certain percentage will be accepted as correct. For those decisions which a party may consider wrong, the Board tells him the basis of the decision, informs him of his right to appeal and how, provides him with the assistance of "worker advisers", allows the latter or the representative of the employee's choice (a lawyer, a union official, a league of injured workers) access to the case file, and provides him with a full hearing into the special details and nuances of the case

— first before an Appeal Adjudicator, with a further right of appeal to an Appeal Board if he is still dissatisfied with an adverse result. One can hardly deny that, at least on its face, workers' compensation in Ontario offers a considerable degree of legal justice to individual claimants at these later stages of the process.

Yet it has become apparent in recent years that this is no longer sufficient to satisfy the concerns of injured workers and their representatives. We need to insure a high degree of accuracy and fairness in the original disposition of a claim. Not only does an appeal require time, during which the injured worker may suffer financial hardship, but not everyone will use this vehicle to insist on a second look at his file. Not every unlucky claimant has the emotional make-up to challenge an official verdict with the weight of the Workers' Compensation Board letterhead behind it, irrespective of the merits of the case. In any event, it is important to convey to claimants an attractive initial impression of the Board as a body truly sensitive to the interests of injured workers — an accurate impression, I might add. This is essential in order to reduce the level of confrontation which has enveloped the program in the present decade, and to lighten the load which is being placed on the Board's appeal system (not to mention on the Office of the Ombudsman).

This point has not escaped the Board. In the past decade an important refinement was introduced into the system of primary adjudication. A Claims Review Branch was created to serve, in effect, as a fail-safe device to catch possibly erroneous decisions before they were issued. More particularly, if an adjudicator is satisfied that a claim can be granted, he does so on his own. But if he believes that a claim should be rejected, then that file is passed on to the review group in adjudication. These experienced senior claims officials check the material in the file once more, perhaps order further investigations, and often reverse the tentative adverse decision and grant the claim. Of over 20,000 claims scrutinized by the Claims Review Branch in 1979, over 40% eventually produced dispositions favourable to the claimant. In effect, the Workers' Compensation Board affords an injured worker a layer of appeal before he has even heard that there is a problem with his claim.

Some employers take exception to this procedure. They argue that it reflects a systemic bias in favor of granting claims, even unjustified ones. It was suggested to me that if an employer has objected to the claim — e.g., arguing that it was not a work-related injury — then, if the primary adjudicator has tentatively decided to override this objection and to grant the claim, the file should likewise go to the Claims Review Branch for a second look. I am not persuaded by that argument. The current system assumes that the cost of an erroneous decision rejecting a valid claim — thus leaving an individual disabled worker without income to which he is entitled — is greater than the cost of an erroneous decision granting an invalid claim. If the employer's objection is dismissed, it can appeal long before the benefits or pension will affect its assessment rate. The extra consideration now granted by the Board to the losing claimant is defensible.

I suggest that the Board take a further step. While the Claims Review Branch does scrutinize every file before an adverse decision is sent out, it does not systematically inform the claimant of the difficulties in his file before issuing its verdict (whether to reverse or to confirm the adjudicator's original inclination). The worker is not automatically told of the troublesome issues in his case and asked to clarify or defend them. I think that the Board would be wise to modify this procedure. I do not envisage sending a formal, legal-looking notice: just a phone call, if possible, or a letter, if necessary, informing the claimant of the problem, whether it be an initial objection to the claim made by the employer on its Form 7, which first informs the Board of the accident (in which case the employee need simply be sent a copy of this form), or later complications which have arisen during the course of the investigation.

These are cases which have already been screened and singled out for special attention. Thus any innovation at the Claims Review Branch stage would not impact on the vast majority of claims, which sail through the process with no problem at all. Even if the Board adjudicator (or the Claims Review Branch) does clear the matter up to his satisfaction and grants the claim, this simple advance word would let the worker (and his representative) know the reason why the disposition has been held up, and often enlist their help in solving the problem. Otherwise, if a claim is rejected and the worker receives the Board letter and learns of the grounds only at that time, a claimant who has a valid point to make against these reasons is almost sure to appeal and subject everyone to a lengthy and costly hearing process. How much better to give the claimant a chance to make these points before he gets locked into an adversarial stance with the Board, trying to reverse a judgment which has already been made.

Indeed, I would go even further. These are occasions when the claimant's response to this notice and inquiry will not satisfy the adjudication branch, but when past experience indicates that a full-scale hearing before an Appeals Adjudicator or an Appeal Board almost certainly looms down the road. The Board should be on the alert for cases such as these and should schedule a formal inquiry *before*, not after, the initial disposition. If the claimant still loses, at least he will have had an opportunity to make a case within the traditional adjudicative format. If the claimant wins, while he might be somewhat disgruntled at some delay, at least he will have experienced first-hand a tribunal which will bend over backwards to give him every chance to make the best case possible, rather than leave him with the impression that he has had to struggle uphill to extract his benefits from a recalcitrant bureaucracy which initially denied him his "rights" without even the courtesy of a hearing.

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These are rather modest suggestions for enhancing the legitimacy of the Board's first-level decision-making procedure in the eyes of its clientele. But I remain convinced that the Board must maintain its basic model for initial disposition of claims — a streamlined, informal investigative procedure. The more sophisticated, custom-designed adjudicative model will have to be reserved for a tiny proportion of the Board's caseload, almost exclusively for those claims which filter into the appeal stage.

This is so for a simple, practical reason: the need to conserve the resources of the program and the parties. Probably the most important such resource is *time*. The problem of delay is a continuing refrain in reviews of workers' compensation programs. My Inquiry was no exception. Just about every workers' group which appeared before me had an anecdote about some case or other which had taken months, even a year or more, to settle. Of course one difficulty with anecdotal evidence is that one never knows whether it conveys an accurate impression of the overall dimensions of the problem. What are the relevant time frames within which the Board disposes of cases? How does this compare with workers' compensation boards elsewhere, especially in larger industrialized provinces such as Quebec or British Columbia, or with other programs for compensating income loss due to disability? To claim entitlement to workers' compensation benefits, one must establish not only disability, but also work-relatedness (unlike disability benefits under the Canada Pension Plan); however, one need not show that it was due to anyone's fault (in contrast with tort litigation). The Board ends up rejecting only a tiny number (less than 2%) of the claims falling within the outer boundaries of its jurisdiction. In the vast majority of these cases, the disposition is speedy by any comparative measure: 62% of lost-time claims within three days, 66% in a week, 75% in two weeks, 91% in a month. But there are more difficult cases which, if the Board is to be faithful to the statutory scheme, require a good deal more time to ascertain that the basic legal conditions have been satisfied. Reports are needed from the employer, the doctor, and the employee himself. Field investigations may be directed. Sophisticated scientific or medical analysis may be demanded. Even in these troubled cases, the Board seems to me to have an adequate system for locating and reviewing cases which appear to be in a state of suspended animation. A computer keeps track of files in the primary adjudication system and produces cards about undecided cases at intervals of four weeks, six weeks, eight weeks, and so on, in order to alert team coordinators of the delay, and to prod them to find out the reasons for the problem and to try and solve it.

I am aware that these rather detached-sounding observations will offer little consolation to those workers who have been injured, who are not getting a cheque at work, whose family budget may be stretched very thin, and who do not have savings accounts or other resources to fall back on if theirs is the case which needs these extra inquiries. Or, even worse, if theirs is the file which is accidentally lost and thereby testifies to the human flaws in any bureaucratic system. These injured workers are rightfully resentful of being forced to look for welfare assistance, something they find demeaning, when the law has promised them the right to workers' compensation insurance. Their feelings are aggravated if their employer has a private disability plan for non-occupational accidents or illness. Because these schemes are designed to supplement workers' compensation coverage, the private insurer will pay the income lost if and when the Workers' Compensation Board rejects the claim. But as long as the Board's decision is delayed, the unfortunate worker is caught between the stools of two disability schemes which are supposed to dovetail to give him total coverage, but which leave him for the time being with neither. Needless to say, it does not relieve the hardship caused to this individual and his family to point out that the system works pretty well on the average.

One solution, of course, would be simply to hire a great many more adjudicators in order to cut back drastically on the caseload of each. Currently, claims adjudicators average about 225 files apiece (some, on occasion, having responsibility for more than 300 claims at one time). In order to process caseloads such as these efficiently, the Board has had to envelop the adjudicator within a complex organization: telephone inquiry clerks to handle routine phone calls and answer queries if they can from a video screen; counsellors to speak to claimants who show up personally at the Board offices with more complex problems; and special investigators to do field investigations on difficult claims. From one perspective this is a perfectly rational division of labor. From another, it has contributed to a recurring refrain in my Inquiry: that the Board has become a large, impersonal bureaucracy; that the injured worker is shuffled from one Board employee to another, never coming into personal contact with the adjudicator, the person who makes the decision that counts (nor, even worse, the Board doctors, upon whose advice the adjudicators rely for the critical ingredients in that decision). Thus, there is appeal in the proposal to cut back on the caseload of each adjudicator, to give him responsibility for performing nearly all the tasks involved in disposing of a particular claim throughout its life, and to give him time to reflect on the needs and problems of each of the claimants in his charge.

The difficulty with that recommendation is its cost. If the notion were to have real prospects of success, it would likely cost a great deal. The Board now employs over 300 primary adjudicators. I am skeptical that one could achieve much in the way of personalized contact and attention by even a significant cut in the caseload, in the range of 20% for example. A considerably more drastic step would be required, such as halving the average caseload. Attaining this objective would require substantial expenditures of Board resources. This is not an era in which sharp increases in the size of the public service are looked at with favour. If the Board were to attempt to cut the average caseload by reallocating its current administrative budget (which has increased sharply in the past decade), such a move would foreclose the use of these funds to improve the program elsewhere — in rehabilitation, for instance.

Nor is it necessarily the case that a change in the number of and arrangements for adjudicators would make a tangible dent in the delay problem (although greater personal contact between adjudicators and injured workers might alleviate some of the frustration the latter feel about the delay). Much of the information upon which a claim decision is based has to be elicited from people outside the Board: the worker, employer, doctor, or others whose stories must be hear and verified. If there is to be a significant breakthrough in the speed with which workers' compensation claims are processed, I suspect that this will require more than simply spending additional money or hiring additional people. It will require major technological or organizational innovations. By contrast with the problems of benefit structure — the substance of the program — I encountered a distinct shortage of systematically thought-out proposals for refining the administration of benefit claims.

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There is an exception to that generalization. One notion which figured in many briefs and presentations was decentralizing the Board's operation. Historically, all of the Board's adjudication has been done from its head office. At present nearly half a million claims a year, from all over the Province of Ontario, are disposed of in a single multi-story office tower in downtown Toronto. British Columbia (several years ago) and Quebec (just recently) have taken the step of decentralizing claims adjudication to area offices around their respective provinces. Ontario, with the largest workers' compensation system in Canada, did establish area offices some years ago for purposes of information and investigation. Just this year, the Board decided to begin decentralizing the critical function of claims adjudication — in Sudbury on November 3, and in London on December 1. A constant theme of trade unions and other groups representing injured workers is that this decentralization program must be escalated, extended immediately across the entire province as the solution to the problems of bureaucratic foul-ups, delay, and the hardship this inflicts on injured workers.

On its face, this is another attractive idea. The Board's caseload has risen sharply in the past two decades: from 255,000 cases in 1960, to 375,000 in 1970, to 460,000 in 1979. Its staff complement has been growing apace. These thousands of employees are distributed among 20 stories of a downtown Toronto skyscraper. Communication and coordination between them is difficult. It is only too easy for a file to be lost in transit, impossible to locate for someone who is seething at the other end of a long-distance telephone line. Because workers' compensation must function as a mail-order operation in receiving claims and materials and in sending out decisions and cheques, the notorious problems of the Canadian postal service simply aggravate the situation. Nor has the creation of the area offices, however well-intentioned an effort to improve communication between the Board and its clientele, served to mollify the latter. Because an area office cannot solve a difficulty by making a decision on the claim, they are gaining a reputation as just another hurdle in getting through to the appropriate person at the Board's head office. Hence, or so it was put to me, why shouldn't the Board go all the way? The claims adjudicators should be placed in these regional offices. There they would be able to receive the claim, conduct the necessary investigation themselves, and issue the decision in immediate contact with the people and communities involved, rather than through second-hand contact by mail or long-distance phone. Files would be readily available, the number of people involved in any case would be drastically reduced, and there could be easy coordination of the efforts of claims adjudicators, medical services, and vocational rehabilitation.

Considered in and of itself, this appears to be a powerful case. Why hasn't it been acted on before? Why isn't the Board plunging ahead in decentralization across the entire province, rather than moving slowly, gingerly, into only Sudbury and London? The answer is the same one I have noted a number of times before. There is a cost, a necessary trade-off, in any significant step taken in a program as massive and as complex as workers' compensation.

The first value one risks is that of reliability in claims adjudication. It is easy enough to give area offices the responsibility for the simple claims, the ones which need no more than clerical abilities for their disposition, but the ones whose files can get lost in downtown Toronto (or in the mails). But one cannot transfer to Sudbury and London authority over only the easy cases. These offices will also get the difficult cases from their region, the ones which require reflection and judgment by people with talent, training and experience in claims adjudication. The Board can strip its head office of fully competent adjudicators who can be sent to a regional office on their own (assuming that these people are willing to accept such a transfer), in which case the claims process through the head office will suffer. Or the Board must recruit and train new people for the area office, thus requiring an extensive shakedown period in the early years of these new regional operations. In any event, there are some highly specialized functions — e.g., the disposition of industrial disease claims — which cannot really be decentralized. The operation of the Claims Review Branch which I mentioned earlier will have to be considerably revised. Adequate steps must be taken to insure quality control in the new regional offices. In sum, no one would want area offices to develop, in effect, into autonomous compensation districts, applying different standards to workers and employers from region to region.

Producing accurate and consistent decision-making in the new decentralized regime will cost a great deal of money. The dimensions of these costs can be gathered from budgetary estimates for the new Sudbury and London operations. Sudbury generates approximately 23,000 cases a year; London, 26,000 claims. The projected personnel complements to be added to these two area offices are 117 and 110 employees respectively. Of course there will be some drop in the requirements of the head office which will no longer have responsibility for claims adjudication in the Sudbury and London areas. However, factors of economies of scale mean that there is not a one-to-one correspondence between the extra personnel required for the area offices and the decrease in personnel needed at the head office. In fact, the Board projects that the net increase in its staff complement will be 160 employees by the end of 1980, although this will be reduced to 134 employees by the end of 1981. There are two types of cost entailed in decentralization. The initial start-up costs of implementation for London and Sudbury in 1980 — including capital expenditures, hiring, training, *et al.* — will total over three million dollars. The net increase in operating costs for 1981 will be about four million dollars. Ignoring implementation costs for the moment (since these are one-shot expenditures for a new system which will presumably last for decades), the bottom-line figure is that the Board will spend four million extra dollars a year to dispose of fifty thousand cases in London and Sudbury. To put this in perspective, this is a net increase of about 80 dollars a case over the Board's basic administrative budget of 137 dollars per case disposed of in 1979.

Employers, understandably, have qualms about this step, especially about its implications for the future. (The administrative budget in 1970, for example, was less than 32 dollars a case.) In fairness, though, one must also place in the balance the costs of the current arrangements which this investment is supposed to alleviate: the expenses of workers, union representatives, employers, doctors, and lawyers, who must communicate with and even travel to the head office in Toronto from the Ontario hinterlands. We must consider the hardship which afflicts a worker and his family trying to cope when the compensation cheque has been delayed, the frustration that comes in dealing with a huge organization which cannot seem to solve a concrete human problem. These demoralization costs may not be as quantifiable as additional dollars on a balance sheet, but they are real nonetheless.*

Frankly, I am not sure how these costs and benefits actually balance out. These are the kinds of questions which concern me:

i) Whether and to what extent the speed and efficiency of service will be improved in Sudbury and London, and how this net gain looks in comparison with the net additional costs.
ii) On the assumption that workers at or near Sudbury and London should not be treated as a privileged group, what other cities should be considered as candidates for branch adjudication centres (e.g., Thunder Bay, Cornwall, Windsor, Sault Ste. Marie, St. Catharines — even Hamilton and Kitchener, nothwithstanding their proximity to Toronto)?
iii) Do the costs of decentralization go up or down as this process takes its course, and at what point if any do we reach the stage or diminishing returns?

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*I might add that if the Board paid interest on all benefits not immediately granted, perhaps at a rate equivalent to that charged for personal loans to lower-income workers, the cost of delay and the savings from reducing such delay might appear considerably more tangible than they do right now.

iv) Most important of all, when we know what the total costs of full scale decentralization are, will we conclude that this is actually the most effective way of streamlining the system, eliminating the foul-ups, and improving the swift and reliable delivery of claims adjudication services to injured workers in this province? Or are there other forms of organizational and technological breakthroughs (e.g., more elaborate computerization, even satellite transmission, *et al.*) which might achieve bigger gains more cheaply?

I do not have the answers to these questions. So far as I could learn, no one yet has. Until I see thorough analysis of each of these issues, I am not prepared to endorse full decentralization of the system (as the unions want) nor to call a halt to it (as the employers want). The initial decisions about Sudbury and London were made before my appointment and are now in progress. I believe it indispensable that these steps be treated as experiments, as initial probes of the virtures and the costs of decentralization. We must not miss out on this opportunity to analyse and learn from this experience as it takes place. There should be a systematic study mounted by the Board and conductd by qualified people, to determine precisely how and to what extent decentralization does improve the level of service in these communities, and to verify the additional costs which it entails. On this basis, and only on this basis, should plans be laid for the future.

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I am intrigued by quite a different approach to the same general problem. Rather than try to decentralize the Board geographically to deal with its ever-growing caseload, why not try a more radical step: devolution of certain of the Board's functions onto other agencies or parties in order to pare the total caseload down to more manageable proportions? In this way we might be able to concentrate the scarce resources of the Board's adjudicators on the serious occupational disabilities, allowing them to dispose of these problems with as much thought and dispatch as possible. Although there are certain harbingers of this notion in other jurisdictions in Canada, it has not yet seriously emerged on the agenda in Ontario. With rare exceptions, this idea did not figure in briefs and presentations submitted to me. As a result, it would be premature for me to propose specific innovations along these lines. But I shall spend the next several pages exploring some of the possibilities, exposing both the values and difficulties they entail in the hope that this will lay the foundation for serious consideration of this path in the near future.

One candidate for farming compensation work out to another agency is the medical aid claim. The Workers' Compensation Board now processes over 250,000 claims a year in which the employee has not lost any time from work and for which the Board need replace no income. Yet the Board must establish a file for each such case, decide whether the injury was occupational or not, and, if it was, pay the hospital or doctor bills. This procedure made sense 60 years ago, when this was the only method of insuring that the workers's medical costs were covered. Now we have a comprehensive program for public health care insurance. The Ontario Health Insurance Plan (OHIP) has a large organization which specializes in paying all doctor bills, except those for work-related injury and disease. Why shouldn't OHIP add this comparatively small number of cases to its system, relieving the Workers' Compensation Board of the responsibility for processing fully 60% of the cases the Board handles every year?

One question which might be asked relates to financing. The costs of health insurance will necessarily go up if the treatment of occupational injuries is to be covered by this system instead of by workers' compensation. But OHIP is paid for out of individual premiums and general tax revenues, only part of which come from business. The premise of workers' compensation is that employers should pick up the entire tab for the economic costs of industrial accidents, including treatment costs, in order to optimize accident prevention through general market deterrents. The simple answer to this objection is that OHIP would bill the Workers' Compensation Board every year for the expense of insuring occupational injuries (and for this purpose a general formula for calculating these costs would be sufficient). The Workers' Compensation Board could then pass this cost along in assessment rates in accordance with the principles of the compensation system.*

Alberta is proposing to have its health care plan assume responsibility for medical treatment of occupational injuries (without any shift of the costs back to the Workers' Compensation Board). In my discussion with the Ontario Board about the prospects of doing this here, certain problems loomed on the horizon. For example, OHIP does not insure all the costs of treatment which are not covered by workers' compensation (necessary drugs, for example). These would still require that claims be made to the Board by injured workers. Many injuries which start out as pure medical aid claims eventually recur in more serious lost-time cases. While the time span between these two events is normally quite short, occasionally it is not, and the Board would face some difficulties in retrieving the information about the earlier accident and treatment from the parties (since it is unlikely to be able to get this from OHIP).

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*Notwithstanding the objection made to me by some employers, this would not mean that the latter would pay twice, once through the Workers' Compensation Board assessment, and again if and when it paid the OHIP premiums for its employees. If Workers' Compensation Board assessment were to be relieved of all responsibility for medical costs, the OHIP premiums would have to increase correspondingly. One difference that would make is that employers in more hazardous industries would experience a net gain as their workers' compensation assessments would go down further than the flat-rate OHIP premiums for their employees would go up.

These are minor difficulties which pale into insignificance beside the major problem. A key to adjudication of lost-time claims by the Board is the report from the worker's doctor covering the fact of a disabling injury, its nature, its origin, and the worker's state of recovery. These reports are the major source of delay in the system, especially in routine cases. Right now doctors have a personal incentive to cooperate with the Board in expediting the lost-time claim. The sooner they get their material in, the sooner the Board will be able to pay their bills. Suppose that OHIP were to take over the responsibility for paying the doctor's bill. That source of self-interest would be gone. Doctors typically do not like taking time out from practicing medicine to make out reports to government agencies. Although most would cooperate for the benefit of their patients, they would probably take their time in doing so. This change in the program, intended to alleviate delay in the system, might well become a source of even more holdups. True, the Workers' Compensation Board could and would pay a fee for these reports. But my discussions with medical authorities in this province have convinced me that the reporting fee would have to be hefty in order to be an effective inducement (considerably more in the routine case than the eleven percent differential which the Workers' Compensation Board now pays doctors over and above the OHIP scale). At the same time, the Board would lose the leverage it now has in monitoring treatment services and costs (which now saves a good deal of the money needed to pay for the current higher fee schedule).

Still, one has to weigh these problems against the gains the Board might achieve by being relieved of the administration of medical aid claims. In and of itself, these gains might not seem substantial. While significant in number, medical aid claims are relatively simple and require only a small staff to process them. On the other hand, I suspect that the Board would reap subtler but substantial advantages in the long run from having its mail room, its computer, its accounting department, and so on relieved of this massive volume of case files every year. Certainly the results in Alberta must be observed closely. At the minimum, consideration should be given to transferring to OHIP the responsibility for medical bills and industrial injuries which do not involve any loss of working time by the employee (and thus where there is no problem of expediting physicians' reports to Board adjudicators).

This brings me to a considerably more radical step. Perhaps the short-term lost-time claim should be pared off the Board's jurisdiction as well (together with its accompanying medical aid bills). In effect, workers' compensation insurance should have built into it a deductible amount for the short-term income loss. I envisage that this deductible would place the burden of payment on the employer, not the employee. We do not want to set back the evolution of workers' compensation, which has progressively covered injuries lasting more than seven days, then five days, then three days, and now one day. But there is no reason why this liability of the employer need be covered by the public collective insurance scheme of the Workers' Compensation Board, rather than simply represent legal responsibility of the individual employer to its injured employee.

If this step is to be taken, we should do so seriously: by exempting from workers' compensation coverage lost-time injuries lasting up to four weeks or thereabouts. That would mean that some 75% of the 165,000 lost-time claims would no longer have to be processed by the Board.* If that move were made in tandem with a deletion of nearly 300,000 pure medical aid claims from the jurisdiction of the Board, suddenly the dimensions of the Board's workload would have dropped from 460,000 to 40,000 cases a year. There is no reason why these small predictable losses should be included in an insurance scheme at all. The employer would simply be obliged by law to keep on its payroll employees who had been injured at work, paying them their regular wages and benefits for a minimum of four weeks' absence.** Under a scheme such as this, it is highly unlikely that an injured worker's income would be interrupted by the mechanism of processing a workers' compensation claim, except

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*The Board estimates that 32.8% of its lost-time claimants were off work for 7 calendar days or less, another 23.9% for 8 to 14 days, and a further 17.2% were away from their jobs for 15 to 28 days, leaving just 26.1% whose lost working time stretched to 29 days and longer. When I think about this distribution, together with the vast number of pure medical aid claims each year, I have grave doubts about whether the current system best allocates the scarce administrative time and resources of the Workers' Compensation Board.

**I realize that there are industries such as construction, with a pattern of intermittent, short-term employment of tradesmen by small subcontractors, for whom such an obligation might be considered too onerous a burden. For cases such as these, in the statistically exceptional case where there is serious doubt as to whether the injury was work-related or not.

Again, this step poses certain potential difficulties. A particular concern is this: What if an employer refuses to pay the injured worker the wages for the first month of an absence, acting on its own judgment that the injury was not work-related? Even worse, what about the occasional unscrupulous employer who threatens the injured worker with reprisals if he presses his right to occupational injury pay? As to the latter possibility, my feeling is that while it is always true that some employers will violate a law — just as do some unions and some workers — one can hardly reject useful reforms on that ground alone. Instead, adequate remedies and sanctions should be put in place to minimize its happening (as in the case of employment standards legislation in general). As to the former, more likely possibility, if disputes between an employer and his employee about the existence and nature of a disability arise, any such workers' compensation system would have to include expedited procedures for resolving such disagreements. Ultimately, one's judgment about an idea such as this rests on a balancing of the potential advantages and risks it entails. Would employees whose injuries require only short-term absence from work tend to fare better or worse with a procedure of private adjustment of this liability with their own employer? Can one generate substantial improvements in the effectiveness of the public program if it is relieved of the burden of a vast number of small claims? Will this enable the Board to focus its resources and attention to do a better job on this smaller number of more serious, more complex claims? If we are ever to achieve radical improvement in the delivery of workers' compensation in a manner which is both economical and reliable we will have to undertake a thorough exploration of issues such as these.*

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collective insurance by the Workers' Compensation Board might be triggered at an earlier date (after five days of absence, for example). In fact, many firms now have a general sick pay or disability plan, under which the employer does not even have to make a judgment about whether an injury is occupational or not. Of course, the Board would have to be notified by the employer after a certain period — perhaps two weeks — about whether an employee had been injured at work, whether he was still disabled, whether this injury was occupational or not, and whether it was possible that the employee would still be off work after four weeks. This notice would give the Board sufficient lead time to open up a file, to start any investigation required, and to contact the injured employee and his doctor to verify the details of his disability.

*Meanwhile consideration should be given to a change in the method of calculating short-term, lost-time benefits. The Board should be empowered to compute this benefit on the basis of the current wage rate of the employee as of the date of his injury. The Board now calculates the actual wages received by the employee in the previous four weeks (or twelve months). This may give a slightly more accurate picture of the wages actually lost, since it takes account of extra overtime earnings by some workers and lesser earnings of those affected by temporary layoffs. I question

C — Appeals in Compensation

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Even if the Workers' Compensation Board were to dispose of 50,000 rather than 500,000 claims a year (as it might if these speculations of mine were acted upon), and even if this caseload were to be processed through 20 rather than one or three Board offices (depending upon the level of decentralization which we choose), the fact remains that workers' compensation will always be a massive legal and social program. The Board's adjudicators have to proceed in a pragmatic administrative fashion. In the effort to dispose of claims as quickly as possible, they inevitably make mistakes, since, almost by definition, any system of mass justice metes out comparatively rough justice. Although improvement of primary adjudication at the Board must be a high priority objective, gains in this effort will always be incremental. There are intractable limits to the degree of reliability and sensitivity which we can realistically expect from the first look at a compensation claim. That is why we keep in reserve a vehicle for review, a safety net to catch those cases in which the system did not function properly the first time. Hopefully, the matter will be set right the second time around, in the course of this review process. Throughout this chapter I have emphasized the tension between administrative economy and legal justice. In the final analysis, we have to rely on the appeal structure in workers' compensation to provide natural justice to injured workers and their employers.

This observation will come as no surprise to those who have laboured in workers' compensation. In my Inquiry I have been struck by the degree of attention and experimentation which has been given to this problem in Ontario, going back at least as far as 1939, when a Review Committee was first established. The appeal process has been a preoccupation of Royal Commissions, Task Forces, and internal deliberations of the Corporate Board. In the past fifteen years there has been constant tinkering with the details of review, and three major alterations in the appeal structure. The result is an elaborate and, at least in comparative terms, admirable system for review of adverse compensation decisions.

whether the marginal gains in precision (which rest on the assumption that these variations would have been extrapolated into the future) are worth the price in administrative resources and time in the vast number of temporary lost-time claims (for three months or less, for example). This is simply one illustration of the theme of this section: the need to relieve the Board of the obligation to engage in time-consuming procedures in the smaller, less significant claims, in order that it focus its attention squarely on the longer-term, more serious compensation problems.

We have already encountered one of the key ingredients in the current system, the Claims Review Branch, which thoroughly canvasses a file whenever it appears that an adverse decision may have to be made. In 1979, out of more than 21,000 claims reconsidered by the Claims Review Branch, over 40% were altered, in whole or in part, in favour of the claimant before the original decision was ever made and issued.

This still leaves a sizable number of claims rejected at the primary adjudication stage. In each of these cases the Board writes a letter to the claimant informing him of the reasons for the adverse decision and telling him of his right to appeal and how to do so. No particular formality nor monetary charge is required to lodge an appeal; a simple letter will do. Over 3,600 claimants availed themselves of this right in 1979. They encountered a two-stage system of appeal. The first phase consists of review by Appeals Adjudicators, experienced staff employees of the Board who have risen through the ranks. Appeals Adjudicators disposed of 3,600 appeals last year. Their initial review of the file may result in its being sent on to an Appeals Board (this occurred 859 times in 1979). In the other cases, after directing further investigations or conducting a hearing, the Appeals Adjudicator issues a written decision, including the reasons for his finding. The outcome of appeals is positive, in whole or in part, some 44% of the time (1,191 times in 1979).

If the claimant is still unsatisfied with this verdict, he is informed of his right of access to still another layer of review. There are sixteen Commissioners of the Workers' Compensation Board, Order-in-Council appointments who function under the aegis of the Vice Chairman of Appeals. These Commissioners sit on Appeal Boards, rotating panels of three members. They conduct hearings around the province, and in 1979 disposed of 1,527 appeals with reasons for decision, of which some 39% (596 in number) reversed or revised the earlier decision.

Stepping back from these details, two features of the system are striking. First, this internal appeal system is effective. Adverse decisions at one stage are reversed at higher levels of the Board hierarchy, in considerable numbers. Second, the existence of a multi-layered system of review operates to the advantage of only the claimant. If he loses at one level (e.g., at the Claims Review Branch or Appeals Adjudicator) he can pursue the matter to the next level (e.g., to the Appeals Adjudicator and Appeal Board respectively) with a reasonable prospect of a favourable verdict. However, if he wins at the lower level, it is almost unheardof for the employer to exercise its technical right to appeal the judgment further. At the formal appeal stage alone — Appeals Adjudicator and Appeal

Board — the cumulative result is that fully 50% of adverse dispositions by the Claims Branch are changed in whole or in part to the advantage of the claimant.

I have dwelt on these details of the current system in order to dispel some popular misconceptions. Most people gain their impression of the present character of the administration of workers' compensation and its problems from newspaper accounts of the perennial carping and occasional demonstrating over Board decisions. But a remarkable measure of legal justice is now extended to injured workers within the current Board structure. I know of no statutory program which offers a more accessible and elaborate opportunity for review of its initial judgments than does the Workers' Compensation Board, nor one which produces a higher rate of successful claims, whether inside the appeal process or overall.

Yet the chorus of complaints goes on. Reinforcing this discontent is the availability of the Ombudsman, which has provided an external outlet for these pressures. Approximately 700 appeals are made to the Ombudsman every year by Workers' Compensation Board claimants. This has added still another layer of scrutiny to the seemingly interminable process of review in workers' compensation claims, with further investigations, further medical examinations, and further written decisions. Nor does it stop there. If the Board and the Ombudsman are unable to resolve their differences, then the Select Committee of the Legislature, assisted by its own counsel, takes it upon itself to become the penultimate court of appeal for workers' compensation in this province. If all else fails, the matter can be and in fact has been debated on the floor of the Ontario House.

Everyone I spoke to in the course of my Inquiry — the Board, the Ombudsman, the MLA's, the employers, the unions and the leagues of injured workers — agreed that this situation has become intolerable: a waste of the resources of the parties and the taxpayers, and a drain on the time and energy of the Ombudsman, the Legislature, and the Workers' Compensation Board itself. Where can we find a solution to this dilemma, though, given the numerous innovations which have already been tried and the sophisticated structure which is now in place? I believe that the clue is found in the one major flaw of the current structure: however elaborate, however painstaking it might be, the compensation appeal system is an entirely in-house affair. It is productive: some 50% of the appeals produce changes in the original decision. The problem is that the injured worker who is *not* successful, as well as those who have taken up his cause, typically do not see their case in that larger statistical context. Pardonably, perhaps, they are not willing to trust their fate to a procedure which channels an appeal of a decision made by someone in one Board office to another person who works for and is housed at the same Board. What is lacking in the current model is the perception of the structure for review in Workers' Compensation as truly *independent* of the administrative process which has generated these thousands of appeals every year. This, I believe, was the reason for the explosion of compensation appeals to the Ombudsman as soon as this external outlet became available. This is why there is a continuing refusal to accept the legitimacy of adverse compensation decisions, the serious erosion of finality in the system. This is why I propose a radical change in the appeal system for workers' compensation legislation in Ontario (in contrast with the rather modest changes to which I have committed myself in primary adjudication).

Let me hasten to add that I do not endorse what some might see as the natural avenue for such external review of WCB decisions: expansion of the scope of judicial review. The ordinary courts now scrutinize, to a limited extent, the decisions of the Workers' Compensation Board. They will hold the Board to the judicial interpretation of those statutory conditions significant enough to be labelled "jurisdictional", and also to the judicial conception of procedural fairness. But workers' compensation has always been the bastion of those who struggle against absentee management by the courts of the substance of administrative policy. Judicial review is expensive in both time and money. Inviting judges to second-guess the Workers' Compensation Board about the merits of either its general policies or its concrete appraisals simply substitutes an uninformed judgment for the one reached by individuals experienced in the history and context of the immediate dispute. Starting down that slippery slope would be an unfortunate step for both workers' compensation and judicial administration in this province, and both labour and business cautioned me against it.

Nor is the Ombudsman an acceptable alternative. Access to the Ombudsman is less formal and less costly — though not much quicker — than access to the courts. But, like the judge, the Ombudsman is a generalist. He spreads his net over the entire system of public administration in Ontario. He could not possibly master the intricate compromises which are embedded in the structure of Workers' Compensation. I do not mean to downgrade the role of the Ombudsman — he serves as a salutory outside window on massive government programs whose officials may often be too wedded to their own practices and objectives. He holds the decision-maker to a decent level of fairness in the manner in which the proceedings are conducted. He serves as a lightning rod to attract the tensions generated by any segment of government administration. If too many cases accumulate around a particular program or tribunal, the Ombudsman can signal the government that something has to be done about that trouble spot. But the Office of the Ombudsman should not be used as the solution to such a problem. It makes no more sense to designate the Ombudsman as the final authority on claims for compensation by injured workers — as seems to be the current trend — than it would to assign that role to the Divisional Court.

I have in mind quite a different model: a new Workers' Compensation Appeal Tribunal. This body would be a *specialist* in workers' compensation, rather than one with general jurisdiction over government programs. It would be *administrative* rather than judicial in character, in the sense that it would be capable of mounting its own investigation into problems rather than relying passively on a record prepared entirely by the parties and their representatives. Yet the tribunal would exhibit the important ingredients of an adjudicative body: a party would be afforded a hearing at which it could present its own case and meet the objections made to it. And this tribunal would display the other key attribute of natural justice: it would be *independent* of the Workers' Compensation Board from which its appeal work comes, separate and distinct in membership, quarters, budget, and organizational authority.

There is an existing model for what I have in mind. British Columbia established such an external Board of Review for workers' compensation early in the Seventies. I was in British Columbia at the time and thought that this was a sensible development. I returned to B.C. this summer to find out how the institution has fared. No one to whom I spoke questioned the virtues of external review in principle, nor suggested a return to the type of purely in-house appeal structure now available in Ontario (and elsewhere in Canadian workers' compensation). There was widespread agreement that the B.C. system has proved relatively successful in practice, although, as in any human institution, there are certain flaws and problems.

I do not propose that Ontario slavishly imitate the B.C. example. Indeed, my proposal varies at several crucial points. Most importantly I favour an explicitly and thoroughly *tripartite* model: not simply appointing members from the ranks of business and labour (as well as neutral vice chairmen), but also recruiting people who would remain active in management and union affairs, and who would serve only part-time on this Appeal Tribunal. Individual appeals would be heard by three-member panels composed of a vice chairman (usually, although not automatically, a lawyer, but definitely a person with the talent and training to conduct fair and orderly hearings and write clear, principled decisions) and two tribunal members, one from the employer group and one from the worker ranks.

This, of course, is patterned on the design of labour boards in Canada, such as the Ontario Labour Relations Board. For all its advantages, this model does present certain practical difficulties:

i) scheduling panels for a large volume of cases;
ii) avoiding a conflict of interest if a panel member's union or employer is involved in an appeal;
iii) insuring that recruits to the tribunal are familiar with the nuances of compensation law and policy presented by the cases before them; and
iv) avoiding the special perspective which can over-take a respresentative tribunal that is top-heavy with members suggested by the Canadian Manufacturer's Association or the Ontario Federation of Labour, with none from small business, unorganized labour, or even the self-employed, all of whom are much more directly affected by the Workers' Compensation Board than by the Ontario Labour Relations Board.

There are solutions to each of these problems. The government will have to consult closely with the OFL and CMA about prospective appointments, but is must not consider itself bound by their recommendations. It must also consider the suggestions of leagues of injured workers and small business federations. Indeed, we might even anticipate the appointment of a qualified disabled worker to the Ontario Appeal Tribunal and thus follow the brilliant example set by Saskatchewan. My experience with the tripartite B.C. Labour Relations Board suggests the desirability of a core of permanent members to insure an orderly flow of cases and written decisions; with the bulk of the vice chairmen and also a minority of the side-members being full-time tribunal members. Appointments would be for three years, renewable only once in the case of members. This would provide sufficient time for the members to develop experience and familiarity with compensation issues, but still permit a regular infusion of new blood and fresh perspectives as replacements are made at staggered intervals.

There are significant virtues in such a tripartite design. First, it is the best method for insuring the quality of appointments. Rather than having the Appeal Tribunal serve as a graceful step towards retirement for individuals who have "paid their dues" in certain organizations (including political parties), business and labour groups would be able to place on this body younger union or management officials who are currently involved in duties related to compensation, who are prepared to give part of their time to this significant public service, but who could not personally afford to be diverted for three full years from their primary career pattern. These people would bring to their work on the Appeal Tribunal the variety of current perspectives about workers' compensation which can be found in the different regions — from Thunder Bay to Cornwall — and in the different industries — from construction to mining — of this large and varied province.

It is important to emphasize that these Board Members would not function as pure delegates of their outside organizations, acting as no more than advocates of their particular interest groups, right or wrong. While they can and should make certain that all the concerns of the workers and employers in that region or industry are brought forth and taken into account, ultimately they must be prepared to make a balanced judgment about the merits under the statute of the case before them. Development of that kind of ethos on the tribunal is not merely a fond hope. During my stint as Chairman of the B.C. Labour Board, we never had more than a dozen dissenting votes in a year out of more than four thousand cases, some of which were of extreme significance to labour and business. (Occasionally this dissent was delivered by a neutral vice chairman against the combined verdict of the union and employer members.) I anticipate that a Workers' Compensation Appeal Tribunal would function in the same judicious fashion.

A longer-range benefit which such a structure affords is that organizations of workers and business would come to appreciate the problems of workers' compensation in this province, as they see and hear of their representatives struggling with the inherent conflicts in the system and attempting to fashion viable compromises among the several legitimate but competing objectives of the program. In my view this kind of participation in making difficult compensation judgments by people who have first-hand experience with the results, who have to live and work under the body of compensation principles which they are interpreting and devloping, is indespensible for renewing the legitimacy of the program and the morale of the three thousand people who now deliver this service.

The design of such a thoroughly tripartite tribunal requires further significant variations from the British Columbia model. I would provide an initial level of appeal within the Workers' Compensation Board itself. I mentioned earlier that we now have a two-stage appeal system; appeals first to a staff Appeals Adjudicator and then to an Appeal Board composed of three Commissioners. I propose to replace only the sixteen Board Commissioners by this independent Workers' Compensation Appeal Tribunal. There are certain objections to maintaining such a multi-layered review process:

i) The availability of an in-house appeal removes some of the prod felt by Board adjudicators to do everything they can to insure that they arrive at a correct decision the first time;

ii) It may encourage claimants to slice away at the system, because they can lodge appeal after appeal with no cost and no downside risk; and

iii) It prolongs the proceedings in particular cases, occasionally to the psychological and occupational detriment of the claimant, who holds out in the hope that ultimately he will win a favourable verdict.

Living with these problems seems a reasonable price to pay for two reasons. The first is a practical one. Review by a single Appeals Adjudicator is an expeditious and inexpensive instrument which can deal acceptably with most of the initial objections now made to Board rulings (over 3,500 such appeals in 1979, a figure which is increasing). Thus this initial review can filter out a good number of appeals which would otherwise overload and clog up the more elaborate, unwieldy Appeal Tribunal. (In 1979 Appeal Boards in Ontario had to handle only 1,500 cases, while the B.C. External Board of Review dealt with over 3,000 appeals.) The second reason is subtler and concerns the sense of morale and administrative integrity of the Workers' Compensation Board itself. As a former administrator, I consider it important to give the Board a chance to correct its own mistakes: to clear up difficulties on a claim which often become visible only after the initial decision was made, and the party realizes that he has lost and vigorously makes his objection known. The willingness of an administrative agency to reverse and revise its earlier decision is an admirable trait, and one which the record shows the Board displaying in recent years. We do not want to disguise this from the consumers of its services.

On the other hand, judgments about the merits of a concrete appeal made by a high-profile Appeal Tribunal must be considered *final* to all intents and purposes, whether in the eyes of the Workers' Compensation Board, the courts, or the Ombudsman. Under British Columbia legislation, there remain several routes by which the Workers' Compensation Board may, as a matter of course, review and reverse decisions of the External Board of Review (whether these decisions have reaffirmed or altered the first WCB adjudication). This strikes me as inconsistent with the rationale for an *independent* forum for compensation appeals, and would detract from the degree of authority which would be necessary to attract senior figures from the active ranks of business and labour in this province to serve on the Appeal Tribunal. It would also be a misuse of time of the top officials of the Workers' Compensation Board itself. To the extent that the focus of an appeal turns on the features of the immediate case, we would have to be willing to accept the verdict of the Appeal Tribunal as final.

This, then, leaves the question of what to do about matters of general law and policy. I anticipate that the Appeal Tribunal would produce reasons for their decisions which would be made available not only to the parties, but also to the wider community, and which, hopefully, would be collected and published in usable form.* Suppose it is claimed that the judgment of the appeal panel in a single case rested on a stated general principle which is incompatible with the interpretation of the statute or the established policies of the Board, which has to deal with hundreds, even thousands, of such cases every year. Who should have the final say? I believe it should be the Workers' Compensation Board. The Corporate Board of the WCB should have the discretion to call such a case up for further scrutiny. (However, there should be no right of an individual party to push its case to this ultimate stage of review.) The Board would then canvass the issues, not simply with the immediate parties involved in the claim, but also with other organizations, such as the OFL or the CMA. Once it thought the matter through to its satisfaction, the Board would issue a general policy statement with supporting publishable reasons, which would govern both this appeal and similar cases in the future. I envisage that such action would be taken no more than a dozen times a year, in cases of serious importance to the overall system which would be ripe for Board resolution. If there still remained a dispute about who was right, the Workers' Compensation Board or the Workers' Compensation Appeal Tribunal, the government of the province would have the matter thoroughly aired and squarely presented to it for legislative resolution.

The ingredient crucial to the success of the new Appeal Tribunal is the person who heads it. He (or she) should be called the Chairman of Compensation Appeals. He should have a high legal profile, should be the kind of person we would want appointed to the Supreme Court bench. He should have a staff of bright young legal and administrative assistants to help him coordinate the flow of work and preserve coherence in decision-making across the many panels. Especially in the early stages, he himself should handle the key appeals in matters of law and policy, in order to get the development of a workers' compensation jurisprudence underway. He should also have the authority to refer an issue of general importance to the Corporate Board of the WCB for scrutiny of the kind described above. If the government is not now prepared to look for and appoint this kind of person to a position of such significance in the overall system, I would advise it *not* to create the Compensation Appeal Tribunal; and thus to use up the idea of external review before its time has yet arrived in Ontario workers' compensation.

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* I do not advocate practice of rigid adherence to strict precedent, as a great many participants in the compensation field fear. Surely it is high time, though, that Ontario begin to develop a coherent jurisprudence of workers' compensation by using a series of concrete appeals to work out and refine sensible principles and policies.

This brings me to the final feature of my proposal. The Chairman of Compensation Appeals should be a full-fledged member of the Corporate Board of the Workers' Compensation Board (the makeup of which I will canvass in a later section of the chapter). I recognize that to a certain extent this status for the Chairman of Appeals would pierce the barrier between the two bodies which some may consider indispensable to the integrity of a truly independent system of review; however, I believe that this would detract only slightly if at all, from the perceived independence of the Appeal Tribunal. In any event, the risk is well worth taking in order to guarantee the cooperation which is necessary between these two bodies which, after all, would be partners in the common enterprise of providing fair and decent workers' compensation in this province. It is important that the top echelons of the Workers' Compensation Board include someone who is regularly and directly involved in adjudication of ticklish concrete cases and appeals, and who is skilled in the articulation of legal principles and guidelines. Even more important, it would be essential that the members of the Appeal Tribunal have a clear sense of the overall dimensions of the sytem of compensation — its caseload, financing, and personnel problems — when they issue their rulings in concrete cases that would inevitably serve as precedents for the future. There are costs in any structure for external review of administrative programs. The danger of absentee management is among the most prominent arguments against extensive *judicial* review. An open channel of communication is necessary to avoid that flaw in the program. In my view, putting the Chairman of the Appeal Tribunal on the Corporate Board of the Workers' Compensation Board would be, on balance, the most attractive response to this need.

D — Medical Review Panels

Refurbishing the general appeals structure within the workers' compensation program is not a sufficient measure for restoring confidence in it. Additional remodeling is required for appeals over specifically medical questions, the most intractable of the disputes now enveloping the Workers' Compensation Board. Did the worker actually suffer a physical injury or contract a disease? Was the injury produced, at least in part, by his work for a particular employer? To what extent has the injury physically impaired the claimant's performance at work? Has the worker actually recovered fully from the disability? These questions are at the central core of a workers' compensation system, yet the answers are only too often problematic.

Epitomizing the difficulty is the back injury, which now comprises fully 25% of the compensation claims in Ontario. In contrast with the loss of a limb, for example, a back injury is not visible to the eye and is often difficult to locate even in a thorough medical examination. The degree of pain and impairment produced by quite similar slipped discs is highly variable from one individual to another. Since back deterioration is a natural feature of the aging process, there is usually a question as to whether an event in the workplace was a significant cause of the immediate impairment. Because recovery is so heavily dependent on the worker's age and psychological makeup, the nature of his occupation, and the length of time he has been off work, there is room for endless disagreement about whether the actual physical disability in the back has healed and the obstacles to returning to work are now attitudinal.

Different doctors perceive and respond to these tenuous, imprecise issues in different ways, influenced by their position, their relationship to the parties, their theories about medical treatment, and even their social philosophy regarding programs such as workers' compensation. Therein lie the seeds of much of the conflict which surrounds the compensation system. An injured worker consults his physician about an ailment which he believes he developed at his job. The family doctor is naturally sympathetic to his patient. He is prepared to accept the latter's recollection of the events leading up to the disability and also its current dimensions. He gives the patient no reason to doubt that this is an occupational disability and that compensation will be forthcoming. Then the claim is lodged with the Board. Perhaps it is queried by the employer. The file is reviewed by Board adjudicators and doctors, who have encountered thousands of claims and are rightly skeptical of the validity of some of them. Some claims are rejected, occasionally because of doubt about the existence of a real disability, but more likely because it is deemed that the disability does not fit within the statutory confines of workers' compensation.

The injured worker and his family doctor react with dismay. Further medical evidence may be developed, and an appeal is lodged, first before an Appeals Adjudicator, and then, if necessary, before an Appeal Board — all laymen in medical matters. Often they will request further examinations and evaluations from Board doctors or consultants. However, the latter do not testify in front of the panel and cannot be confronted by the worker, his representative, or his doctor. If the appeal ruling proves unfavourable, this process does not engender the kind of confidence necessary to make the verdict the final one. The claimant follows the well-blazed trail to the Office of the Ombudsman, perhaps even to the Select committee of the Legislature. These bodies solemnly engage their own specialists to examine the claimant and to render another opinion. Too often this simply adds to the myriad contradictory medical views in the file, leaving the dilemma to be wrestled with by the Ombudsman and senior Board officials, still another group of medical amateurs.

To some extent this escalating administrative battle is generated by the substantive character of the program. The special trouble spot is the use of a medical rating of the degree of physical impairment to decide how much money to pay for an occupational/economic disability. If, as I have proposed, the benefit structure for permanent partial disability is revised and compensation is paid for actual wages lost because of the claimants's inability to perform suitable, available work, this source of conflict will be removed. I do not suggest that this will resolve the entire problem of how to settle medical disputes. Indeed, this new benefit provision will put much greater weight on judgments about whether the disabled worker has actually recovered sufficiently (from a back problem, for example) to perform in a job which the Board's rehabilitation division has found him. So long as we are to maintain a special program of *workers'* compensation, one which contains limits as well as confers rights, someone will have to make these problematic decisions about the presence, the causation, and the duration of work-related disabilities. The current system under which these judgements are made and reviewed is no longer acceptable. Profound changes are needed to secure legitimate final verdicts in these medical controversies.

The briefs and presentations from almost all injured worker groups tackled this issue directly. A common refrain was that we should "abolish the Board doctors" and require the Workers' Compensation Board to accept the judgment of the claimant's own doctor. After all, so it was argued, the family doctor is most familiar with the medical history and current condition of the injured worker. Why not rely on his judgment about the status and source of his patient's present disability?

Predictably, employers did not find this proposal terribly attractive (no more than would injured workers appreciate the suggestion that the verdict of the company doctor be accepted by the Board as final and binding). I believe that this proposal misconceives the nature of the issue. It is one thing to rely on a worker's own doctor to decide what kind of medical treatment is in his best interest; it is quite another thing to let him decide whether a large sum of money should be awarded to the worker from a public fund. A decision about entitlement to workers' compensation must satisfy complex statutory requirements. We want accurate and consistent rulings about these legal conditions in the flow of cases before the Board. One simply cannot delegate the effective authority to make the critical judgment under this legal program to whichever doctor a claimant happens to select. Instead the Board uses its own staff doctors for this purpose, doctors who are independent of either of the parties, and who develop the experience and perspective which comes from analyzing thousands of such compensation claims year after year.

This does not solve the problem of how to restore confidence and finality in this most contentious area of the Board's work. Consistent with the position I articulated earlier about the general problem of appeals in workers' compensation, a solution to this dilemma naturally suggests itself. For appeals which turn on specifically medical issues there should be a Medical Review Panel, composed of sufficiently eminent specialists to provide an unimpeachable verdict. This notion is not alien to workers' compensation in this province. Under Section 22 of the Act, the Board can now refer an especially troublesome case to a medical referee for appraisal. However, this procedure is at the discretion of the Board, which tends to use it sparingly (less than a dozen times a year). Nor has there been much call for its expansion in Ontario. Because the selection of the independent consultant is in the hands of the Board, the claimant's suspicion of the Board's medical staff is likely to be transferred to the outside medical referee.

British Columbia, however, at the same time that it was revising its overall appeals structure, also implemented this notion of a blue-ribbon panel of doctors, experts in the field and beholden to neither the parties nor the Board, who would act as the final court of appeal in medical controversies within workers' compensation. I was in British Columbia when this procedure was first introduced, and I was impressed then with its common sense. I became considerably more intrigued when I experienced first-hand the degree of contention which attends the problem in Ontario right now. There is a broad consensus of opinion among both labour and business that the device should be imported into Ontario. Again, while the British Columbia experience serves as a useful model, my proposal has a number of variations and refinements tailored to the Ontario environment.

These are the essential ingredients of such a procedure:

i) *Composition:* Each Medical Review Panel (MRP) would be composed of three members designated for each appeal. They would be drawn from a roster designated by the Lieutenant Governor-in-Council, after consultation by the Minister of Labour with the Ontario Medical Association, the Association of Medical Colleges, and other interested groups. Each relevant medical specialty will have its own roster of nominees. In any particular appeal, the employee should have the right to select one doctor from this list, the employer the right to another. (If either party failed to make its pick within a set period — ten days, for example — the Minister would make the choice instead.) The two designated specialists would then agree on a third to complete the full panel.*

ii) *Timing:* An MRP should be available to the parties only after at least one appeal decision has been rendered. Typically the medical issue is intertwined with other matters of fact or law. The ordinary appeal process could provide reasons for decision which would settle the non-medical issues and isolate the relevant, controversial medical questions posed by the case. Especially in its incipient stages, this novel institution should not be used too early nor too often. Still, I would empower the Board, in its discretion, to send a case to an MRP at an earlier stage if it were clear that the dispute was over a well-defined medical issue and that direct reference to an MRP was the quickest and most economical way of finally resolving the claim. (As a practical matter this action by the Board would often be in response to a request by one party or the other.)

iii) *Entitlement:* In another major change from current practice in Ontario, the MRP should be available as a matter of right to any claimant (or the employer-party) who wants to refer the dispute to such a body. British Columbia adds the condition that a party can insist on an MRP only if its doctor certifies that he disagrees with a pertinent medical judgment which has been made in the disposition of a claim. Such a filtering process would not likely exclude any legitimate medical appeals from this forum and would undoubtedly serve as a sensible hedge against overuse of a procedure which would be rather expensive. (I reiterate that the Board would retain the discretion to establish an MRP on its own, a step which it should be ready to use if and when it perceives the nature of the dispute which is emerging on a difficult claim.)

iv) *Screening:* It is crucial to the success of this device that references to an MRP be carefully screened. It is a novel step in our legal system that workers' compensation rely on adjudication by doctors of an issue with legal significance, even one which is inherently medical. We must insure that the doctors' views are not permitted to govern matters which are really historical, legal, or policy in nature. One must never put to an MRP a global question, such as whether a claimant is or is not entitled to certain benefits. Even such apparently scientific terms as "cause" or "disability" often have lurking in them further strands of compensation law and policy. Thus the specific medical issues in the case must be carefully isolated, the non-medical assumptions explicitly stated, the burden of proof allocated, and a series of precise medical questions put to the panel for answer. This is not an easy task. It should be performed by a legal assistant to the Chairman of the Appeal Tribunal, under the latter's direction. Normally the person preparing the reference would be able to rely on the reasons for decision delivered by an Appeals Adjudicator. (If these are inadequate for the purpose, I would give the Compensation Appeals Chairman the authority to delay the MRP pending a further canvass of the dispute by a panel of the Appeal Tribunal.) Since these terms of reference for the MRP are likely to be crucial in shaping the nature of the medical inquiry and judgment, I would require that they be communicated beforehand to the parties for their comments and objections (although no hearings should be required for this purpose).

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*An alternative might be to follow B.C.'s lead and to establish a limited roster of general practitioners assigned to the Medical Review Panels in rotation, and in charge of administering and coordinating the work of the panel. There are virtues to this idea: A general practitioner can provide the broad perspective of the non-specialist to an injured worker's case, which occasionally may involve more than one medical specialty. My own preference is to have the administrative coordination of the panels provided by the office of the Chairman of the Appeal Tribunal, who might recruit a respected, semi-retired general practitioner for this purpose. A serious difficulty in the system in British Columbia is its reliance on a small group of active general practitioners, who can provide only limited time for this work, as a result of which the MRP procedure is badly clogged with a backlog of medical references awaiting a panel.

v) *Procedure:* Doctors on an MRP should not have to proceed in a legal fashion in order to arrive at their medical determination. This is not meant to be an adversarial, adjudicative process. However, the panel should have full access to the Board's files and the right to direct further inquiries or to secure additional material as needed. I consider it important that there be personal contact between the MRP and the injured worker, including a physical examination by at least one of the doctors — and usually by all three. It is equally important that there be no private communication between Board doctors or the claimant's doctor and the MRP. Any panel requests for information or opinion should be made known to the parties together with the written answers.

vi) *Finality:* The object of this exercise is to secure a decision from an MRP which will be final and binding upon both the Board and the parties. While this need not be specified in the Workers' Compensation Act, I presume that the verdict of these notable specialists would not be second-guessed by either the Ombudsman or the Select Committee. However, the MRP (or a new panel constituted by the Minister, if necessary) should be able to take a look at fresh evidence not reasonably available at the time of the first inquiry, and reconsider and revise its initial decision on this basis. For example, the claimant may later undergo surgery which produces samples of internal tissue which can be subjected to laboratory analysis and result in a different medical verdict. But it is indispensible to the integrity of the procedure that a party not be able to appeal and reappeal adverse medical decisions simply by finding another tribunal or another doctor who is willing to say that he disagrees with the diagnosis of the MRP.

vii) *Financing:* Adequate consultant fees will have to be paid in order to secure the top specialists from the major teaching hospitals in the province for the Cabinet's roster. While the Board should have no control over the selection or payment of MRP's, the overall budget of this system—as of the Appeal Tribunal — should be billed by the Ministry of Labour to the Board and passed along in assessments to the employers (and, recall, beyond). Medical Review Panels are not inexpensive, considered by themselves (over $1,000 a case in British Columbia). My conviction is that they will prove cheap in comparison with the endless cycle of appeals which is now overtaking workers' compensation in this province.

E — Representation and Disclosure

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Two further elements of adjudication by the Workers' Compensation Board attracted considerable attention in the course of my Inquiry. One of these was representation of parties before the Board; the other, disclosure of information contained in the files of the Board. Each constituent is important in fashioning a fair system of administration of workers' compensation.

The right of the injured worker (or the employer) to professional representation before the Board is now well established, both in law and in fact. While the Board continues to favour an administrative rather than a purely judicial manner of proceeding, it has long conceded the right to counsel at its hearings. This right is meaningful in practice. In the vast majority of disputed claims before the board, the injured worker has experienced representation from one source or another.*

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*Statistics from 1979 regarding Board appeal hearings convey the extent and variety of such representation. A considerable number of workers are represented by lawyers of their own choosing (in 239 Appeals Adjudication hearings in 1979, and in 142 Appeal Board hearings). This is not surprising. Many workers' compensation claims are worth a great deal more money than the typical personal injury case in court. In recognition of this fact, the Ontario Legal Aid Plan finances such legal representation in two ways. The Plan granted legal aid certificates for individual legal

It is remarkable how extensive a network of representation of injured workers has emerged in Ontario in the past decade. And an especially attractive feature of the current system is that it functions without the high contingency fees and associated ailments which afflict workers' compensation in the United States.

The Workers' Compensation Board itself provides a form of representation to injured workers. It employs three Worker Advisers to assist claimaints who are having trouble with the system, to investigate the reasons behind a claim delay, to try to get the difficulty cleared up informally if possible, and to represent the worker in an appeal hearing if necessary. In 1979 Worker Advisers dealt with 1,666 requests for assistance, conducted 1,337 interviews of claimants, and attended 226 Appeals Adjudicator hearings and 528 Appeal Board hearings on behalf of the claimant. Of the appeals in which the Advisor was involved, 131 were allowed by the Appeals Adjudicator and 107 rejected, while 221 were allowed by the Appeal Board and 277 rejected. In addition to this 50% success rate at the formal appeal stage, the Advisors took 37 cases back to the claims adjuducation branch with new material, of which 32 were allowed, and another ten cases back to the rehabilitation branch, of which six were allowed.

I heard some comments — not surprisingly from trade unions, injured worker groups, *et al.* — that the Worker Advisers were not useful instruments, because they suffer from an inherent conflict of interest between the injured worker whom they represent and their employer, the Board, whom they are challenging. The suggestion was made that the institution be dismantled and the money saved used to finance private efforts at representing compensation claimants. The figures quoted may be a sufficient answer to this suggestion. In my view, the office of the Worker Adviser should be expanded and made more accessible, rather than contracted. But to meet the objection, the institution should be revised in accordance with the general principles which I have formulated for administration of workers' compensation. In particular, the Worker Advisers should be extracted from the Workers' Compensation Board itself, in terms of both their physical quarters and their organizational authority. The Ministry of Labour should select, pay, supervise, and house them. Although this step would sacrifice some of the current ease of access and rapport between the Worker Advisers and the Board staff, I believe that the price is worth paying to reinforce the perceived independence and legitimacy of the institution in the eyes of its clientele. Once major

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representation 237 times in 1979. As well, the Plan now funds three community clinics, two in Toronto and one in Hamilton, which focus specifically on workers' compensation claims.

Numerically the most important source of representation is trade unions, many of which now have compensation specialists on their staff. In 1979, the unions represented 1,596 claimants at Appeals Adjudicator hearings and 236 claimants at steps are taken along these lines with the formation of the Workers' Compensation Appeal Tribunal and the Medical Review Panel, this change in the status of the Worker Adviser follows naturally.

I propose further that the Ministry of Labour establish an Employer Adviser. Employers have a legitimate interest in and role to play in workers' compensation. This will become even more significant in the future with the advent of mandatory experience rating of individual firms. The small businessman, in particular, often finds the rulings of the Workers' Compensation Board as mysterious as does the injured employee. Unlike the latter, an employer does not have ready access to the impressive network of experienced representation as an alternative to expensive education through legal counsel which he pays for himself. A full-time Employer Adviser would be an equitable response to this concern. I might add that the cost of this expanded compensation advisory and advocacy service to be provided by the Ministry — with separate worker and employer offices — should be billed to the Workers' Compensation Board to be recouped through the assessment system.

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Due process in the administration of public programs such as workers' compensation normally requires some form of experienced representation in difficult, contested cases. But to be fully effective, counsel needs to know the case which has to be made and the case which has to be met. Thus, full disclosure of the materials in the Board's file would seem to be the logical implication of the principles of natural justice. But this suggestion has always evoked concern and objection in the contest of workers' compensation.

The typical workers' compensation claim is not the subject of a contest between the worker and his own employer (in contrast with other employment or labour relations cases), because the claim will be paid for by the collective fund, not the individual firm. Thus the Workers' Compensation Board cannot function as a passive umpire scrutinizing the record developed by the contending parties; instead, it must actively investigate and develop the case for or against the claim. The file produced largely by the Board serves as the basis for the initial disposition of a claim. To a considerable extent, the file also influences the fate of an appeal which is the subject of a hearing. Given the historical flavour of workers' compensation as n

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the Appeal Board level. The organizations of injured workers which emerged in Ontario in the Seventies have as one of their chief roles assisting claimants seeking compensation benefits (especially in permanent partial disability cases). Student legal aid societies at the province's law schools often provide this representation in tandem with such injured worker groups (in 1979, at 240 Appeals Adjudicator hearings and 205 Appeal Board hearings). Finally, and quite significantly, provincial MLA's represented claimants at a total of 484 Appeals Adjudicator hearings and 96 Appeal Board hearings.

inquisitorial rather than adjudicative process, one can understand (although not justify) the reluctance of Boards across Canada to disclose the contents of their files to the parties affected by their decisions.

More recently, though, the attraction of natural justice has asserted itself. Rights of appeal and representation have been firmly entrenched. In the new setting, the tradition of secrecy first appeared anomalous and then intolerable. The question was posed: How can a worker effectively appeal a denial of his claim, how can counsel effectively represent his client, without having the data from the Board's file which might be crucial to the case?

To a considerable extent, the Ontario Board has recognized the force of these criticisms. At the same time as it has been elaborating its appeal structure, the Board has taken a number of steps towards disclosure. The Board began by making summaries for the parties of all documents and reports in its file. These summaries are often a useful distillation of the material, especially for those who lack the time or aptitude to wade through the voluminous technical documentation. Ultimately, though, summaries are not sufficient. They contain only one view of what is relevant to the fate of a claim; worse, it is the view of an employee of the Board, not counsel for the claimant. Thus the Board took the next step: providing access to its files to the legal counsel or other (arm's-length) representative of a party to the case. The latter are permitted to read the file at the Board's offices (either in Toronto or in an Area Office, to which a copy of the file will be sent). However, they can only take notes on a file's contents, not photocopy important documents. And they must sign an undertaking not to disclose the contents of the file to the party whom they are representing.

I suggest, at the minimum, that the Board take the obvious next step in this evolution. It should dispense with the requirement that counsel attend at the Board offices, try to read and absorb a client's file during the Board's office hours rather than his own, and waste considerable time trying to write or dictate detailed notes. If counsel (legal or other) is on the record in a case, the Board should send him a photocopy of its file. Under its current procedure, the Board is willing to trust this representative not to disclose the contents of the file which he has read and whose pertinent details he has written down. The same signed undertaking should be sufficient if a photocopy of the file is in the representative's office.

This simple administrative step would remove much of the irritation rooted in the current system of disclosure. It would take the Ontario Workers' Compensation Board quite a bit further down the road towards full disclosure than almost any other Canadian Board has ventured. And given the pattern of representation described earlier, this measure would meet most of the practical needs for disclosing material necessary for fair and effective adjudication of compensation claims. However, it would not answer the issue of principle posed in this area: suppose the injured worker wants to know the contents of his file on the simple ground that it concerns him personally, describing his own injury and situation (not to mention that he might want to conduct his own case or be able to instruct his own counsel effectively). Why shouldn't the Board take the final step of full disclosure of its file to the injured worker himself?

In my view, the main explanation for this final reluctance about disclosure is historical, stemming from the fact that workers' compensation in Canada is only gradually emerging from its closed, in-house, investigative style of decision-making. But several tangible grounds were offered for maintaining some restrictions in place, reasons which should be spelled out and addressed on their merits.

A common argument made against full disclosure (one which I heard in several Canadian provinces) concerns the case of the worker who may be suffering from incurable cancer, whose family doctor feels that the time is not yet right for telling him this, but whose compensation file contains such a blunt and bleak message. An analogous case would be one in which the worker suffers from a mental illness which might be aggravated by his encountering certain information in his compensation file. The reason for non-disclosure in these instances is humanitarian concern for the worker himself.

There is a simple response to this argument. These cases are admittedly rare ones, and they should not serve as the footing for the general practice of non-disclosure to the injured worker. In any event, even in such situations, it should not be up to the Workers' Compensation Board to decide whether and how such possibly damaging material is to be communicated to the worker. Instead, the Board should release its file to the claimant's own doctor and let him decide whether and how his patient can be told.

A second argument might justify a broader cloak of secrecy around the Board's files. It is said that only with the protection of confidentiality can the Board elicit frank observations about the nature, origin, and current status of a worker's disability. For example, if a worker's doctor knows that what he reports to the Board will automatically be disclosed to his patient, he will likely couch any potentially adverse comments in the most innocuous and least informative terms possible. The Board frequently relies on such outside medical opinion (and, it will be recalled, the trade unions and injured worker groups want *more* reliance placed by the Board on the views of doctors selected by the worker), yet a policy of full disclosure might dry up these sources of helpful information. (There is a similar problem in the case of non-medical information; for example, the statements of a fellow worker about the events in an accident might be adverse to the position either of the claimant or of their employer.)

My own experience with the B.C. Labour Board leaves me sympathetic to these concerns, at least in principle. However, I am dubious about the weight to be placed on these fears in the current environment of workers' compensation in Ontario. The Board now provides summaries of the reports in its files. It shows the entire file to the worker's representative. This material is bandied about in hearings of contested claims attended by the injured worker and often by his employer. Ultimately the Appeal Board renders a written decision with reasons referring to as much of the material as is relevant. Among those observers with whom I discussed this matter, there was a consensus that it did not take a particularly astute claimant to identify any outside source of damaging information. Thus the current halfway disclosure policy gives the Board the worst of both worlds. The Board's practice already generates enough leakage to have the impact it fears upon doctors and others who might worry about disclosure of their observations. But it does not go far enough to allay the suspicions of those who believe that the Board has something to hide. No one suggests that it is feasible (or desirable) for the Ontario Board to retreat from the current state of access to its files. Under the circumstances, the soundest move seems to be towards full disclosure (a step that was taken in Quebec for all compensation appeals since January, 1980).

This judgment is subject to one further caveat. If natural justice dictates that the Board's file is to be disclosed to the injured worker (with the medical reports conveyed through the family doctor), the same principle demands that this material also be delivered to the employer, if and when the latter actually contests a compensation claim. But if the Board respects the principles of natural justice in this fashion, it may put itself in conflict with another fundamental principle — the confidentiality of personal private information, especially relating to the worker's medical condition.

Some union officials expressed practical concerns about such breaches of confidentiality. Suppose, for example, the Board has learned of a claimant's pre-existing disability, one which was not revealed by the employee on his initial application for employment. Or the Board's rehabilitation branch finds that a disabled worker's alcoholism is a major contributor to his failure to return to work after an injury. Or the Board's investigator has interviewed fellow workers who disagree with their supervisor's version of an accident. Release of this information might trigger action by the employer which is detrimental to the employee. One answer to this concern is that enactment and enforcement of a ban on discrimination on account of workers' compensation claims would provide some protection against any such employer reprisals.* The vast majority of union leaders and injured worker groups with whom I canvassed this problem were prepared to accept disclosure to the employer as the price for full access by the injured worker to the Board's file on his claim.

Of course, such consent by the majority might not be sufficient to bind the dissenting individual worker who asserts that he has personal right of privacy which must be held inviolate against any disclosure of intimate medical details, some of which may have been reported to the Board by his own family doctor. I do not feel qualified to appraise this debate in the context of a general inquiry about workers' compensation. In fact, it is the subject of a Royal Commission on the confidentiality of medical records, a problem which arises in a variety of other public programs (e.g., OHIP) and legal proceedings (e.g., personal injury litigation). As a result of the analysis of this Commission, the Ontario legislature may decide that there should be personal legal protection against disclosure of confidential medical information in any context, a privilege which would then apply in workers' compensation cases. Absent such a general principle, though, I recommend that the parties to a contested workers' compensation claim, whether worker or employer, be entitled to have copies of all material in the Board's file on the claim sent either to their representatives or to them personally.

F — The Policy-Making Role of The Board

Up to this point in the Report I have dwelt on Board adjudication of compensation claims. Interestingly, this was the only facet of the Board's decision-making which appeared in the briefs and presentations submitted to me in the course of the Inquiry. Emphasis on the provision of legal justice in individual cases is quite understandable, consistent with the general drift of Canadian administrative law. In my view, though, such a single-minded focus is unfortunate, especially in a program which deals with nearly half a million claimants a year. The process by which the Board adopts the general policies under which its employees handle this flow of cases is certainly worthy of attention.

There are at least two significant features of this problem. The first is the composition and organization of the Corporate Board, the body which is responsible for laying down the WCB's general policies. The second is the manner in which the Corporate Board proceeds in developing these broad standards and guidelines.

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* I might add that not all action by the employer should be treated as illegitimate discrimination: e.g., removal of a worker from a job in which he is exposed to a level of a chemical which is detrimental only to workers with a peculiar susceptibility which, the Board has learned, this particular claimant possesses.

At the moment, the seven-member Corporate Board is composed of the Board's Chairman, its Vice-Chairmen of Administration and Appeals, and four Commissioners of Appeal. I have proposed the creation of a new independent Workers' Compensation Appeal Tribunal, which would replace the Appeal Board Commissioners. It would be appropriate that the Chairman of this new Appeal Tribunal join both the Board Chairman and its Vice-Chairman of Administration (or General Manager) as an equal member of this highest policy-making organ in the compensation system. But in filling out the roster of the Corporate Board, we should seize the opportunity to consummate the Board's transformation from a closed, in-house operation. added to this executive core should be a number of outside directors, on the model of the Board of Directors of a major corporation (public or private).

I would like to see a variety of perspectives thus reflected in the membership of the Corporate Board: the points of view of labour, management, medicine, vocational rehabilitation, occupational health and safety, and the economics of income maintenance. (The presence of the Chairman of the Appeal Tribunal insures the presence of the legal angle.) It is important, though, that the number of outside directors be kept small enough to allow the Corporate Board to function as a cohesive deliberative body rather than as a primarily representative institution. It goes without saying that the principal criterion for selection of Board members should be their demonstrated experience with and understanding of compensation, not political patronage (either in the government or the private arena).

My aim in this proposal is evident. Just as the outside community should be brought into the appeal system, it must be involved in the development of general policy for the Workers' Compensation Board. The way to do this is not through a body such as the current Joint Consultative Committee — a large, external, and purely advisory group. These outside directors should be part of the ruling organ of the Board itself, with access to the resources and research staff of the Board, and forced to take major responsibility for the judgments that they make. Through this vehicle the Board executives will learn first-hand what their clientele is thinking and seeking. It should also help teach these outside interest groups something of the difficult real-life compromises which are necessary among the competing ideals in compensation.

Once this new Corporate Board has been fashioned, how should it proceed? In recent years the Workers' Compensation Board has been groping towards a more sophisticated approach to general policy making, exemplified by the way it has addressed the issues of decentralization and experience rating, which I canvassed earlier. The subject of administrative policy making has recently surfaced on the agenda of Canadian administration and Canadian administrative scholarship. The Workers' Compensation Board should draw on this lore to complete its own evolution.

The first thing which must be done is to create a policy planning secretariat, attached to the Corporate Board. I have alluded a number of times to the lack of empirical research and sustained policy analysis in Canadian compensation. But significant judgments do have to be made, based on whatever material is available. The Board's usual practice is to establish a committee of senior branch directors who may have considerable experience with the problems, but who find it difficult to steal time from their heavy administrative duties to reflect on the future directions of the program as a whole. What is needed is a small corps of people with the time and the capacity to tackle a problem such as permanent partial disability, for instance — to analyse its component parts, get the views of the operations personnel about current problems, investigate alternatives being tried or proposed elsewhere, and formulate the pros and cons of each for the Corporate Board to consider. As and when a specific initiative is adopted by the Board, this same secretariat should be able to design or commission a systematic study of its impact. It bears repeating that workers' compensation is a seven-hundred-million-dollar operation in Ontario alone. Surely it is sensible to invest a tiny proportion of this money to investigate where it is being spent fruitfully and where it is not.

But these policy judgments, no matter how sound they might be, should not simply be arrived at by a small Corporate Board and announced to the outside world (not even by a Board containing a number of outside directors). Once the Board has identified a problem and directed the appropriate research and analysis, it should as a rule issue a position paper which details the various solutions under consideration and invite the reaction of affected groups and individuals. Representations which the Board receives should in turn be made public so that they can be responded to as well. Indeed, in certain cases the Corporate Board should even conduct a hearing on such a matter; not for the purpose of hearing testimony under cross-examination, but rather to stimulate debate among its different constituencies and a dialogue between them and the Board itself. At the end of the process, the Corporate Board would issue a policy statement formulating its new guidelines and their rationale, for use by administrative and adjudicative staff. As a matter of course this step should be followed up with impact research, which would also be made public. Those initiatives which prove successful can then be expanded, and those which do not can be liquidated. In an earlier section of this chapter, I recommended that the Workers' Compensation Board have the final say on compensation policy in a case of direct conflict with the Workers' Compensation Appeal Tribunal. This recommendation was made *only* on the assumption that the Corporate Board would be designed and organized to fashion compensation policy along the lines which I have just sketched.

The vision that I have of the Workers' Compensation Board as reflected in these proposals can be summed up in this final comment. The Corporate Board should regularly deal with new and troublesome issues of workers' compensation in a manner which would obviate the type of Inquiry being conducted right now by an outsider such as myself.

G — Conclusion

In an earlier chapter of this Report I proposed a full-scale renovation of the structure of workers' compensation benefits, particularly for permanent partial disabilities. In this chapter I recommend major revamping of the decision-making process of the Workers' Compensation Board, particularly in the area of appeals. There is an intimate connection between the substance and the administration of this program: there is no point in the Legislature's fashioning a shiny new appeal tribunal if the same old law is still to be applied. At the same time, the delicate judgments required by several of the novel legal concepts which I have endorsed make it imperative that there be the type of tribunal in which both claimants and employers have full confidence. A thorough overhaul of these two dimensions of the program is necessary if we are to reduce the level of conflict now enveloping workers' compensation in this province.

5

Future Prospects for Workers' Compensation

A — Introduction

This Report canvasses a number of currently pressing issues in workers' compensation in Ontario. Many of these questions go right to the heart of the program and test our views about the basic principles embodied in the legislation. Throughout this phase of my Inquiry I have proceeded on two assumptions: first, that workers' compensation is a comparatively distinct and self-contained program for dealing with occupational injuries; second, that it will remain so in the foreseeable future. The first assumption is artificial, and the second is by no means self-evident.

Workers' compensation is obviously not the only program for protecting Ontario workers against loss of income when they are disabled. We have already encountered the permanent benefit paid under the Canada Pension Plan, which provides a minimum level of income protection for totally disabled workers however they were injured. More important in this connection is the common-law tort action, which has traditionally been the vehicle for securing redress for income lost as a result of injuries suffered in motor vehicle accidents, from defective products, on unsafe premises, and so on. This is the route which must be pursued by the Ontario worker who seeks restitution for injuries he suffers off the job. In the last decade or two, serious doubts have been expressed about the viability of tort litigation as a sensible instrument for repairing and distributing the costs of accidents. Royal Commissions in New Zealand and Australia proposed abolishing the tort action in personal injury cases and replacing it with a general scheme of social insurance. New Zealand, though not Australia, has acted on that proposal. Numerous politicians, organizations, and scholars have advocated that Ontario emulate New Zealand (and the Netherlands, where a similar plan has been enacted). From one perspective it might be fairly said that workers' compensation was a precursor of such a step, in the sense that the compensation system took employment injuries out of the courts, where recovery depended on elusive judgments about legal fault, and entrusted them to an administrative process of compensation through a collective fund. Now, or so argued a number of briefs, it is time to take the next step in that evolution. Society should collectively guarantee workers (indeed, all citizens) against loss of income from personal injuries, irrespective of whether they arise "out of and in the course of employment".

A traditional argument against such a system of social insurance for accident costs rests on the objective of prevention. A favourite defense of either tort litigation or workers' compensation is the assertion that this is an important instrument in reducing the overall accident toll, an end which is undeniably more desirable than providing compensation after the fact. As far as industrial injuries are concerned, a challenger to workers' compensation has recently arrived on the scene. In 1978 Ontario enacted Bill 70, the Occupational Health and Safety Act, as a systematic attack on the problems of unsafe work-places in the province, under the aegis of the Ministry of Labour and an Advisory Council on Occupational Health and Occupational Safety. The question naturally arises, can we now rely on direct regulation of specific industrial hazards to optimize accident prevention in the workplace, and thus feel free to fold workers' compensation into a general scheme of accident insurance? If we choose not to do so, what should be the relationship between the new division of the Ministry of Labour, which has direct statutory responsibility for occupational health and safety, and the long-established Workers' Compensation Board, which receives a ceaseless flow of data about occupational injuries, has long financed a variety of safety associations of Ontario employers, and has available the economic instrument of assessing individual employers according to their comparative safety performance?

These are some of the fundamental issues lurking beneath the surface of the current debate about the shape and future of workers' compensation in this province. I do not propose to answer them here. As I stated in the preface to this Report, the Minister of Labour wanted my analysis of these problems to be left to a second phase of the Inquiry, pending a review of the immediate and serious problems which had to be confronted within the framework of the current program. But I shall use the remainder of this chapter to discuss briefly how certain of the ticklish problems faced within workers' compensation take us towards, even beyond, the boundaries which separate workers' compensation from competing systems for redressing industrial injuries.

B — Tort Litigation for Employment Accidents

An apt illustrationof this theme is a Board decision of the past summer which evoked public comment and figured in a number of the presentations made to me. A supermarket employee was injured by the explosion of a pop bottle which he was shelving. The employee wanted to sue the soda pop manufacturer and bottler on the grounds that their product was defective and had caused him injuries over and above those for which he could collect from the Workers' Compensation Board. The defendants in the law suit, both employers doing business in Ontario, brought the matter to the Board under Section 15 of the Act, and the Board held that the plaintiff's cause of action had been taken away by Section 8 of the Workers' Compensation Act.

Should this statutory bar to third-party litigation over industrial injuries be repealed? There is clearly an appealing case to be made on behalf of this injured worker. Workers' compensation does not provide full redress for his injuries. The source of the injury was a defective product manufactured by a party other than his employer. If the plaintiff were able to show that the defect was the fault (in the legal sense of the term) of the manufacturer, why should he not have the right to sue the third party for the additional damages, thus exercising the same right of tort action enjoyed by all other citizens of the province?

There is a flaw in this argument: the fundamental difference between the situation of the worker and that of other citizens. Employees get the benefit of the historic trade-off embodied in workers' compensation, the one described in the first chapter of this Report. They are guaranteed protection against a certain level of income lost due to occupational injuries, irrespective of whether they are able to establish legal fault on the part of someone who is able to pay a tort judgment. In return, they relinquish the right to sue for additional damages against an employer, regardless of fault on the latter's part. But, it might be argued, the situation described above is different, because the defendant soda pop manufacturer was not the employer of the plaintiff. It seems to me, however, to be drawing a rather artificial line if we let the right to sue in cases such as these depend upon whether the injured employee was shelving the bottles in the supermarket or packing them at the manufacturing plant. Ontario employers contribute collectively to the compensation fund, and Ontario employees enjoy that protection collectively. If an employee is not entitled to sue his own employer for an occupational injury, he should not be able to sue another employer who is covered by and contributing to the same program.*

Some people might well respond that *all* employees should be entitled to sue *any* negligent employer in court. From this point to view, workers' compensation would serve as no more than a minimum floor of benefits for the injured worker, which would have to be supplemented by the more generous, individually-tailored tort action. Needless to say this position has gained considerable momentum from the chorus of complaints about the current program in Ontario, with its low income ceiling, inadequate flat-rate survivorship benefits, the "average justice" meted out by clinical rating of permanent partial disabilities, the erratic pattern of adjusting pensions to the rate of inflation, and so on. If major improvements in these areas of workers' compensation are not forthcoming, the pressure to restore and expand the scope of tort liability will build up even further (as one can see happening right now in the United States). The employer community was unanimous in the view expressed to me that it would be a step backwards to enlarge the role of the tort action in handling occupational injuries in this province. In principle I agree with them. But if the current statutory line is to be held, there must be the type of comprehensive renovation of the benefit structure which I have developed in this Report. It is fair to say that Ontario employers also recognize and accept this fact of life.

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*For that reason, I would amend the Act to establish the same restriction on the current right of action of Schedule II employees against other Ontario employers. There are historical legal reasons for this distinctive treatment, but these no longer stand up to scrutiny under a modern view of the functions of workers' compensation.

There is another facet to the debate about tort litigation and industrial injuries. Even if one does not favour the tort action as a significant source of compensation for the injured worker, one might be induced to use it as a vehicle for penalizing an individual employer for accidents caused by egregiously unsafe practices. I heard some strong sentiments in favor of changing the Workers' Compensation Act to permit tort litigation against the employer over and above compensation benefits in those cases where the employer's conduct was grossly negligent.

On the surface, it is tempting to use the tort action as an instrument to deter flagrantly unsafe behaviour. On the other hand, many critics of tort law are dubious about whether the prospect of a civil damage award is a meaningful threat to corporate employers, especially in an era of widespread liability insurance. My point in raising the issue is not to commit myself to a firm recommendation right now. This will require a thorough analysis of the comparative worth of tort litigation (and the damage award), occupational safety regulation (with its quasi-criminal fine), and workers' compensation itself (through its assessment of employers) as instruments for prodding business towards greater efforts in reducing the injury toll in Ontario workplaces. Before starting back down the path of tort litigation, might it not be wise to explore the option of more extensive use of the assessment lever of the Workers' Compensation Board? Rather than rest content with surcharges and refunds which vary with a firm's accident experience (whether measured in terms of frequency or aggregate cost), would it not make sense to vary the pension in terms of the hazardousness of the plant and the riskiness of the operation (measured in terms of either violations of safety regulations or the introduction of new safety programs and equipment)? This is one of the important issues in the future of workers' compensation to which I shall return in the next phase of my Inquiry.

C — Industrial Disease

The third-party tort claim is a comparatively minor border skirmish as far as the Board is concerned. Industrial disease bids fair to be the major battleground of the next decade, exposing serious questions about the future viability of workers' compensation. Deep concern about this subject was expressed in a number of submissions to my Inquiry. Public edginess about the connection between the work place and disease is growing in Ontario. We live in an era of chemical-based technology, and advancing medical knowledge is unearthing evidence that more and more compounds are potentially toxic. Shortly after I was appointed to study workers' compensation, the Government of Ontario created a full-fledged Royal Commission just to explore the problem of asbestos. This Commission's mandate included a study both of the hazards posed by asbestos for workers who produce and handle it, and of the performance of workers' compensation in dealing with workers afflicted with asbestosis. I shall be cooperating with this Royal Commission in analyzing the latter issue as it falls within our respective terms of reference.

This final chapter of my first Report permits me to sketch in a preliminary way the nature of the problem posed by industrial disease for workers' compensation. Consider these facts: Around 80% of premature deaths among adult Canadian workers stem from diseases of one kind or another. About 95% of the recipients of total disability benefits under the Canada Pension Plan are disabled by disease rather than by accident. But only 2 to 3% of workers' compensation claims and pensions are awarded to victims of disease-based disabilities. There is no *a priori* reason why this disparity should continue indefinitely. Evidence is accumulating which indicates that the etiology of diseases such as cancer is, to a considerable extent, environmental in character. Most people spend much of their adult life in their work environment. If connections between industry and disease were ever to be firmly established, there could be a major qualitative change in the composition of compensation claims.

This linkage has not yet been thoroughly demonstrated, although due to no particular reluctance on the part of the Workers' Compensation Board. While the rejection rate of industrial disease claims is higher than the total claims rejection rate, the Board still accepts the validity of a substantial majority of these cases. Interestingly, industrial diseases constitute a tiny proportion of the workload in workers' compensation systems around the world, even those with a significantly different statutory framework and administrative procedure than that of Ontario. I suspect the explanation is to be found deep in the structure of workers' compensation, which is designed with traumatic injuries in mind: the accident at a single, identifiable point in time producing an immediately evident injury. It is easy for the Board to determine whether the injured person was an employee at the time, who his employer was, and whether the injury occurred at and as a result of his work. Perhaps the major legal advance entailed by workers' compensation was its elimination of the additional requirement of fault, the major source of contention in tort law. This permits administration of workers' compensation to proceed smoothly and quickly in disposing of the issue of entitlement — of work-relatedness — in the vast majority cases, leaving as the main bone of contention issues of the extent and duration of the disability.

The paradigm case of the industrial disease is qualitatively different. Most disease claims to the Workers' Compensation Board are for respiratory diseases, in particular for various forms of lung cancer. The basic problem is that there is a lengthy latency period between the time of first exposure to an environmental hazard and the time that the symptoms of the disease appear, a period measured not just in years but in decades. The Board must perform the thankless task of deciding whether the present disease should be attributed to the claimant's job of a long time ago.

These are some of the special difficulties encountered by the Board in such a medical/legal inquiry:

i) Often there is no clear agreement about the length of the latency period for a particular disease. Medical estimates may range from five to 25 years. How is the Board to decide which of the claimant's jobs may be the source of the disease, especially since in our highly mobile labour face, the person may have worked in a half dozen places during the relevant time span (some of these jobs outside as well as inside the province)? Even if the employee's entire working life was in employment covered by Ontario Workers' Compensation, the Board may have to impute the disability to a particular employer for purposes of experience rating.

ii) Typically, the risk of disease varies with the intensity of exposure to the hazardous substance or process. How is the Board to retrace the claimant's work history to determine precisely what this degree of exposure was in a plant some 20 years earlier, a plant which probably has either closed down or radically changed its technology?

iii) Few diseases are specifically industrial, in the sense that exposure to a particular process or substance is both necessary and sufficient for the employee to contract the disease. To the extent that the workplace plays a role, it does so because of features which it shares with many other aspects of the environment. How is the Board to decide, for example, whether a cancer was produced by exposure to radiation at work rather than at the many other places where such exposure can take place?

iv) Individual predisposition, whether congenital or as a result of personal habits, renders certain people peculiarly susceptible to particular diseases. It is commonly asserted that smoking does not simply add to the hazard of certain environmental risks, but actually multiplies them. Should smoking therefore be taken into account, and to what extent, in allocating the cost of the disease to the workers' compensation program?

v) All of these practical evidentiary difficulties assume that we know that there is a cause-effect relationship between the work environment and an industrial disease. Too often we do not know. We may have cogent grounds for suspecting a connection because of epidemiological studies which show that the number of people in a certain industry who contracted the disease was greater than in a comparable population which was not exposed to that industrial process. But this kind of study does not enable us to trace the precise link between the workplace and the disease. In fact, it leaves the statistical likelihood that some of the workers contracted the disease from their non-work environment. Unfortunately, the law requires the Board to make an all-or-nothing judgment about each individual claim, deciding whether this one fits into the occupational category or not. Too often the Board simply does not have a scientific basis for doing so.

These are just some of the knotty problems for workers' compensation posed by industrial disease. Viewed from within the program, here are a number of policy issues which must be confronted:

i) From the point of view of the claimant, should the Board discount the degree of recovery in terms of the relative contribution to the disease of the external environment or the worker's personal habits? Or should the law simply deem that the employer and the Board must take the worker as they find him?

ii) From the point of view of the employer, is it consistent with the objectives of an experience rating plan to impute the cost of a disease to a firm when the latency period was so lengthy that at the time the worker was exposed to the hazard no one knew of the connection between process and disease?

iii) From the point of view of the Board, should it rely on case-by-case adjudication of these industrial disease cases under an open-ended statutory provision? Or should it maintain schedules which establish presumptive connections between certain diseases and certain industrial processes? If the latter tack is to be pursued (although presumably not to the exclusion of the former for novel cases), how should the Board go about consulting the scientific community (as well as business and labour) to enhance the quality of its policy-making in this area)

I intend to address these and a number of related issues concerning industrial disease in the second phase of my Inquiry.

The main reason for spending this part of my first Report opening up the subject of industrial disease and sketching the difficult challenge it poses to workers' compensation, is that grappling with this issue exposes the fundamental dilemma which characterizes the future of workers' compensation: Do we want the Board to continue to make tenuous judgments about the relationship between a current disability and an old job?

Take these hypothetical cases. Two men, each aged 45, develop lung cancer. Initially they are totally disabled and unable to work. Then they die, each leaving a dependent widow and young children. The practical human problem is that these families need money to live on. The legal issue is whether they should be given the benefit of the generous level of income maintenance provided under workers' compensation (especially lucrative if it is improved as I have recommended) or be left to the minimal income from CPP disability benefits, supplemented by private resources or welfare assistance. What is the evidence about the origin of the disease in the two cases? Both men were heavy smokers and thus prone to develop respiratory cancer. One worked in a plant where he was exposed to a potential carcinogen. The other worked in an office, but lived in an area where there was a variety of carcinogens in the atmosphere. And at the crucial time when each was exposed to this hazard, neither he, nor his employer, nor the general community was aware of the hazard of either the industrial process or the surrounding environment.

When one considers these two cases, we cannot evade the question of what social aim is served by trying to decide whether the first man's job "caused" his cancer for the purpose of fitting him within the income maintenance scheme of workers' compensation. Will this judgment assist in reducing either the impact or the incidence of the disease? Does it provide an economically sound and socially just allocation of the costs of those diseases which do appear? Some 65 years ago we made the decision to dispense with the issue of fault in providing redress for industrial injuries. More and more people now wonder whether in the case of industrial disease alone or for industrial accidents generally the time has come to dispense with the issue of work-relatedness as well, in deciding whether and how much income is to be paid to people who cannot work because of a personal disability. Therein lies the fundamental dilemma for those who would reshape workers' compensation in Ontario.

Table 1

Selected Indices of Inflation and Wage Movement, Canada and Ontario, 1955–1979

	Price Indicators		Interest Rate Indicators				Wage Indicators	
	Consumer Price Index, Canada, 1971=100[1].	G.N.E. Implicit Price Deflator, Personal Consumption Expenditure 1971=100[2].	Chartered Banks' Prime Business Loan Rate, Jan. 1 of Each Year[3].	Bank Rate Jan. 1 of Each Year[4].	Yield on Government of Canada Securities, 3–5 Years, Jan. 1 of Each Year[5].	Investment Yield, W.C.B. Accident Fund, Schedule 1[6].	Average Weekly Earnings, Industrial Composite, Ontario[7].	Average Hourly Manufacturing Earnings, Ontario[8].
1955	67.5	69.5	4.5 %	2.0 %	2.35%	3.35%	$ 63.55	$1.53
1956	68.5	70.6	4.5 %	2.75%	3.21%	3.19%	$ 66.86	$1.60
1957	70.7	72.8	5.5 %	2.78%	4.80%	3.26%	$ 70.63	$1.70
1958	72.6	74.7	5.5 %	3.95%	3.64%	3.29%	$ 73.21	$1.75
1959	73.3	75.6	5.25%	3.5 %	4.50%	3.57%	$ 76.48	$1.82
1960	74.3	76.3	5.75%	3.53%	5.49%	3.94%	$ 78.74	$1.88
1961	75.0	76.8	5.75%	4.85%	4.60%	3.92%	$ 81.30	$1.93
1962	75.8	77.8	5.5 %	3.29%	4.14%	4.22%	$ 83.65	$1.98
1963	77.2	79.0	5.75%	4.0 %	4.43%	4.32%	$ 86.22	$2.06
1964	78.6	80.0	5.75%	4.25%	4.64%	4.27%	$ 89.82	$2.13
1965	80.5	81.6	5.75%	4.75%	4.53%	4.68%	$ 94.41	$2.24
1966	83.5	84.3	6.0 %	5.25%	5.24%	4.88%	$ 99.40	$2.37
1967	86.5	87.2	6.0 %	5.25%	5.20%	5.14%	$105.86	$2.52
1968	90.0	90.8	6.5 %	6.0 %	6.53%	5.60%	$113.54	$2.71
1969	94.1	94.3	7.0 %	6.5 %	6.99%	5.97%	$121.56	$2.93
1970	97.2	97.7	8.5 %	8.0 %	8.23%	5.99%	$131.52	$3.19
1971	100.0	100.0	7.0 %	6.0 %	5.37%	6.24%	$143.04	$3.47
1972	104.8	104.0	6.0 %	4.75%	5.46%	6.53%	$154.92	$3.74
1973	112.7	111.6	6.0 %	4.75%	6.25%	6.73%	$165.70	$4.06
1974	125.0	124.2	9.5 %	7.25%	6.99%	7.78%	$181.43	$4.53
1975	138.5	137.2	10.5 %	8.75%	6.32%	7.73%	$204.85	$5.18
1976	148.9	147.4	9.75%	9.0 %	8.20%	8.72%	$228.72	$5.87
1977	160.8	158.3	9.25%	8.5 %	7.62%	8.52%	$249.46	$6.47
1978	175.2	170.0	8.25%	7.5 %	8.36%	9.39%	$264.04	$6.90
1979	191.2	185.5	12.0%	10.75%	9.88%	9.41%	$285.57	$7.48
% Change, 1955 to 1979:	+ 183.5%	+ 166.9%	+ 166.7%	+ 437.5%	+ 320.4%	+ 180.1%	+ 349.4%	+ 388.9%

Sources:

1. Statistics Canada, CANSIM data series, Matrix No. 429.
2. Statistics Canada, CANSIM data series, Matrix No. 529.
3. Bank of Canada, "Selected Canadian and International Interest Rates, Including Bond Yields and Interest Arbitrage", no date, p. 28.
4. *Ibid*, p.1.
5. *Ibid*, p.8.
6. Unpublished Workmen's Compensation Board data.
7. 1955-1961 data: Dominion Bureau of Statistics, *Review of Employment and Average Weekly Wages and Salaries*, annual, Cat. No. 72-201, Table 6. 1962-1979 data: Statistics Canada CANSIM data series, Matrix No. 1468. Data are for establishments with 20 or more employees. Prior to 1961, data based on 1948 Standard Industrial Classification. 1961 Standard Industrial Classification used for subsequent data.
8. 1955-1961 data: Dominion Bureau of Statistics, *Review of Man-hours and Hourly Earnings*, Cat. No. 72-202, Table 10. 1962-1979 data: Statistics Canada CANSIM data series, Matrix No. 1470. Data are for establishments with 20 or more employees. Prior to 1960, data based on 1948 Standard Industrial Classification; 1961 Standard Industrial Classification used for subsequent data.

This table compares increases since 1955 in several indicators of price and wage movements.

The first two, the Consumer Price Index and the G.N.E.* implicit price deflator for personal consumption expenditure (P.C.E.), are commonly-cited indices of living costs for the consumer. The C.P.I. index measures the changing price of a *constant basket* of goods and services over time in various urban centres across Canada, while the P.C.E. index incorportes *all consumer expenditure* in the economy, such that changes in price, taste and innovation are monitored. Note that the C.P.I. has increased by 184 p.c. since 1955, while the P.C.E. index increased by 167 p.c.

The next four columns show the rates charged by the chartered banks on loans to their best customers (i.e., the prime rate), the rate at which the Bank of Canada is prepared to lend funds to the chartered banks (i.e., the bank rate), the yield on 3 to 5 year Government of Canada securities, and the yield on W.C.B. investments made on behalf of the Schedule 1 Accident Fund. Note that the Board's investment yield has surpassed the bank rate and the yield on government securities for much of the past decade; however, the overall *rate of increase* in this yield since 1955 has been exceeded by both the bank rate and yield on Government of Canada securities.

The final columns show two measures of wage costs in Ontario since 1955: weekly earnings for the industrial composite, and average hourly manufacturing earnings. Both have substantially outstripped price movements since 1955 (349 and 389 p.c. versus 184 and 167 p.c.) and have exceeded increases in all interest rate indicators except the bank rate.

*Gross National Expenditure

Table 2

Indicators of Workmen's Compensation Board Workloads, Ontario, Quebec and British Columbia, 1979

	Ontario	Quebec	British Columbia
No. of Incidents Reported as Work Injuries[1]	460,972	362,541	187,528
No. of Pure Medical Aid Claims Allowed[2].	247,552	147,257	67,614
No. of Disabling Injury Claims Allowed[3].	165,456	179,284	77,237
Reported Work Injuries as Percentage of Provincial Employment	11.5%	14.0%	16.7%
Allowed Disabling Injury Claims per 100 Employees in Province	4.1	6.9	6.8
Total Amount Paid Out During Year (Not Including Any Funds Set in Reserve)[4].	$431,175,000	$298,725,000	$159,816,000
Employer Assessments per $100 Covered Payroll[5].	$1.80	$1.93	$1.86
No. of Employers Covered[5].	155,100	126,530	71,039

Sources:

1. Ontario Workmen's Compensation Board, *Annual Report 1979*, Summary of Operations, p.1; Commission des Accidents du Travail du Quebec, *Rapport Annuel 1979*, Summary of Operations, p.1; British Columbia Workers' Compensation Board, *63rd Annual Report for the year ended December 31, 1979*, p. 14.
2. Data collected by Occupational Safety and Health Branch, Labour Canada. (1979 figures update those found in Labour Canada's *Work Injury Experience and Cost in Canadian Industry*, 1969–1978, Oct. 1979); 1979 figures are preliminary. Ontario data are for claims set up and allowed, status at March 31 of following year.
3. *Ibid*; 1979 figures are preliminary. Disabling injury defined as any work injury (including fatalities and occupational illness) that prevents worker from reporting for work or effectively performing all duties connected with his regular work on any day subsequent to the day on which the injury occurred, or results in the loss by an employee of a body member or part thereof or in a complete loss of its usefulness or in the permanent impairment of a body function whether or not the employee is prevented from reporting from work or effectively performing his regular work. Ontario data are for claims set up and allowed, status at March 31 of following year.
4. Data collected by Occupational Safety and Health Branch, Labour Canada (updates material found in *Ibid*; "total amount paid out" is amount paid out during year for medical aid, compensation for lost

earnings and pensions, but not including any funds set in reserve.
5. Ontario Workmen's Compensation Board, unpublished data; Quebec's Commission de la Santé et Sécurité du Travail, unpublished data; British Columbia Worker's Compensation Board *63rd Annual Report for the year ended December 31, 1979*, p.22; assessment rates calculated as total amount assessed divided by total (estimated) assessable payroll.

Table 3

Indicators of Workmen's Compensation Board Workload, Ontario, 1960, 1970 and 1979

	1960	1970	1979	% Change, 1960–1979
No. of Incidents Reported as Work Injuries[1].	255,961	373,133	460,972	+ 80.1%
No. of Pure Medical Aid Claims Allowed[2].	172,498	221,407	247,552	+ 43.5%
No. of Disabling Injury Claims Allowed[3].	67,971	126,917	165,456	+ 143.4%
Reported Work Injury Claims as Percentage of Provincial Employment	11.4%	12.3%	11.5%	—
Allowed Disabling Injury Claims per 100 Employees in Province	3.0	4.2	4.1	—
Total Amount Paid Out During Year[4].	$50,300,000	$140,624,000	$431,175,000	+ 737.3%
Employer Assessments per $100 Covered Payroll[5].	$1.10	$1.14	$1.80	+ 63.6%
No. of Employers Covered[5].	91,750	138,886	155,100	+ 69.0%

Sources:
1. Ontario Workmen's Compensation Board, *Annual Report*, 1960, 1970, 1979, Summary of Operations, p.1.
2. See note No. 2, Table 2. Data for 1960 are unpublished W.C.B. figures.
3. See note No. 3, Table 2. Data for 1960 are unpublished W.C.B. figures, for allowed and settled claims.
4. See note No. 4, Table 2. Data for 1960 are unpublished W.C.B. figures.
5. See note No. 5, Table 2.

Table 4

Employment and Injury Rates in the Mining and Construction Industries, Ontario, Quebec and British Columbia, selected years

	Ontario		Quebec		British Columbia	
	Employment in Industry as % Total Employment 1979[1].	Disabling Injuries per 100 covered Employees 1978[2].	Employment in Industry as % Total Employment 1979[1].	Disabling Injuries per 100 Employees 1979[3].	Employment in Industry as % Total Employment 1979[1].	Disabling Injuries per 100 covered Employees 1979[4].
Mining and Quarrying	0.9%	15	1.1%	17	1.8%	9
Construction	5.7%	8	4.7%	12	6.6%	20
All Industries	—	4	—	7	—	7

Notes:
1. Statistics Canada, *The Labour Force*, December 1979, Cat. No. 71-001, and unpublished Labour Force Survey data.
2. Research Branch data, Ontario Ministry of Labour (update of Appendix C, *Second Annual Report* of the Advisory Council on Occupational Health and Occupational Safety, p. 386).
3. Commission des Accidents du Travail du Québec, unpublished data. Base used is all employment, rather than covered employment, so figures underestimate true rates. Construction industry includes public works sector.
4. Workers' Compensation Board of British Columbia, *WCB News*, Sept–Oct. 1980, p.4. Rate for mining is average for several sectors: metal mining (10), coal mining (9), gravel pits and quarries (12), and aluminum smelters (5). Construction rate is that for building construction sector.